86-1251

(2)

Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ASSOCIATED FILM DISTRIBUTION CORPORATION,
AVCO EMBASSY PICTURES CORP.,
BUENA VISTA DISTRIBUTION CO., INC.,
COLUMBIA PICTURES INDUSTRIES, INC.,
FILMWAYS PICTURES, INC.,
METRO-GOLDWYN-MAYER, INC.,
PARAMOUNT PICTURES CORPORATION,
TWENTIETH CENTURY FOX FILM CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL PICTURES DIVISION OF UNIVERSAL CITY STUDIOS, INC., UNIVERSAL FILM EXCHANGES,
WARNER BROS. INC., and
WARNER BROS. DISTRIBUTING CORPORATION,
Petitioners

v.

THE HONORABLE DICK THORNBURGH and
THE HONORABLE HARVEY BARTLE, III,
BUDCO THEATRES, INC.,
BUDCO QUALITY THEATRES, INC.,
and
FOX THEATRES MANAGEMENT CORP.,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ERWIN N. GRISWOLD
BARBARA KACIR
Jones, Day, Reavis & Pogue
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Of Counsel

JAMES D. CRAWFORD*
CARL A. SOLANO
Schnader, Harrison, Segal & Lewis
Suite 3600, 1600 Market Street
Philadelphia, PA 19103
(215) 751-2162
Attorneys for Petitioners.
**Counsel of Record*

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On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 80-1179)

Argued May 1, 1986
Before: SLOVITER and STAPLETON,
Circuit Judges, and
MENCER, *District Judge**
(Opinion filed September 12, 1986)

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

This is the second time that this challenge to the Pennsylvania Feature Motion Picture Fair Business Practice Law, 73 P.S. §§ 203-1 to 203-11 (the Act), has been before this court.

The Act has five substantive provisions. First, it prohibits distributors from licensing films through "blind bidding", by requiring the distributors to hold a trade screening of any film in Pennsylvania before entering into a licensing agreement with an exhibitor. *Id.* § 203-4.

Second, the Act provides that a film licensing agreement that bases payment to the distributor on attendance or box office receipts may not also require a minimum payment or guarantee. *Id.* § 203-5. The overwhelming majority of licensing agreements are on such a percentage basis.

Third, the Act prohibits a film licensing agreement from requiring the exhibitor to advance any funds prior to the exhibition of the film. *Id.* § 203-6.

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*Hon. Glenn E. Mencer, United States District Court for the Western District of Pennsylvania, sitting by designation.

Next, the Act prohibits distributors from granting exclusive licenses for any film for more than 42 days. *Id.* § 203-7. As interpreted by the district court, this provision does not preclude negotiation of additional exclusive licenses thereafter.

Finally, the Act regulates the bidding process between exhibitors and distributors by giving all exhibitors who have submitted a bid a right to be present when bids are opened; by giving exhibitors 60 days to examine all bids if they have all been rejected; by requiring distributors to notify all bidding exhibitors of the terms of the successful bids; and by requiring distributors who have rejected all bids to inform all bidders and hold new bidding. *Id.* § 203-8(a)-(e).

Earlier, a panel of this court reversed the district court's order granting summary judgment for plaintiffs. We rejected the claim of plaintiffs, who are out-of-state film distributors and producers who distribute most of the films released in the United States (the distributors), that the Act violated plaintiffs' First Amendment freedoms or was preempted by the Copyright Act on its face. *See Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808 (3d Cir. 1982). However, because we held that on summary judgment, the trial court "could not evaluate the actual impact of the Act (if any) on First Amendment values; could not assess the nature and weight of the state concerns which led to the Act's enactment; and could not balance the state concerns against the threat (if any) to the First Amendment," *id.* at 813-14 (footnotes omitted), we remanded the case to the district court. We directed it to decide, with respect to the First Amendment claim, "[w]hether the Act *in fact* creates any material risk of delay in exhibition or *in fact* threatens to inhibit the production of motion pictures by changing the financial structure of the industry." *Id.* at 812 (emphasis in original).

With respect to the claim of federal preemption by the Copyright Act, we held that, "[w]hether the prohibitions contained in the Pennsylvania Act *in fact* 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' was in dispute." *Id.* at 816 (emphasis in original). We ruled that the trial court should decide "whether and to what extent the Pennsylvania Act interferes with attaining the 'purposes and objectives of Congress.' " *Id.*

On remand, the district court conducted a six-week bench trial to determine the effect of the provisions of the Act that the distributors challenged. The district court then issued an extensive opinion in which it upheld the Act against each of the distributors' challenges. 614 F.Supp. 1100 (E.D. Pa. 1985).

The distributors argue that the facts as found by the district court support their argument, renewed in this appeal, that the Pennsylvania Act unconstitutionally burdens First Amendment rights and is preempted by the Copyright Act. Much of their argument is foreclosed by our earlier decision in this case, although we must consider the effect on the First Amendment analysis of the intervening decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). In addition, we must consider the distributors' argument that the Act violates the Commerce Clause, which was not at issue in the prior panel decision. We turn to that argument first.

I.

The Commerce Clause

The distributors argued to the district court that the Act violated the Commerce Clause both because it discriminated against interstate commerce in favor of in-state commerce and because it unduly burdened

interstate commerce. *See* 614 F. Supp. at 1114. The district court rejected both of these contentions. On appeal, the distributors appear to be focusing primarily on the latter argument, claiming tht the Act unconstitutionally burdens interstate commerce because it seeks to promote an illegitimate objective, and because the means chosen to remedy the problem are not those with the least impact on interstate commerce.[1]

All parties agree that the applicable test is set forth in the Supreme Court's decision in *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted). The distributors claim that the Act's purpose is to redress a bargaining imbalance between the largely out-of-state distributors and the in-state exhibitors. Such a purpose, the distributors argue, is impermissible under the Commerce Clause.

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1. The distributors' brief stresses that almost all of the distributors are located outside of Pennsylvania and that the exhibitors who are benefited are in-state. The district court found that the Act was facially neutral. We agree that under the decision in Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125-26 (1978), there is no impermissible discrimination between in-state and out-of-state commerce. *Exxon* makes clear that the distinction made by the statute between distributors and exhibitors is not the type of discrimination that the Commerce Clause forbids.

The distributors do not point to any evidence to support their assertion that the Pennsylvania legislature intended to equalize the bargaining positions of distributors and exhibitors of films when it enacted the Act. In fact, the district court found that each provision of the Act served other, concededly legitimate, state interests. For example, the court found that the trade screening requirement reduced the risk of deceptive trade practices and "encourage[d] exhibitors to license films based on the merits of the product," thus providing the public the films it wants to see. 614 F. Supp. at 1116. It found that the provision of the Act prohibiting guarantees protected small theaters from going out of business and kept a greater number of films before the public. *Id.* The court found that the ban on exclusive runs of longer than 42 days promoted "the faster dissemination of new films in rural and suburban areas." *Id.* at 1117. Finally, the regulations of bidding promoted "honest bidding practices." *Id.* The distributors have not argued that any of these purposes are impermissible aims of legislation.

Even if the legislature had intended the Act to redress an inequity in bargaining power between exhibitors and distributors, the distributors have not shown that it would be unconstitutional under the Commerce Clause. The distributors rely on the Sixth Circuit's decision in *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982), in which the court considered an Ohio statute similar to the Act. The court, in addressing Ohio's ban on advances and guarantees, held that "a state's interest in righting a bargaining imbalance, *standing alone*, is not sufficient under the commerce clause to permit direct interference with pricing where it burdens interstate commerce." *Id.* at 665 (emphasis added). The court remanded the case to the district court to determine whether other purposes supported the Ohio statute's contract restrictions.

Here, it is clear that other state interests support each provision of the Act. For example, the "Legislative Findings and Purposes", which precede the Act, identify ten interests the legislature sought to further, including insuring "unabridged access for the public to artistic expression and opinion in feature motion pictures at reasonable prices and at many different locations;" preventing "unfair and deceptive acts or practices and unreasonable restraints of trade in the business of distribution and exhibition of feature motion pictures;" and preventing "theatres from unnecessarily going out of business, thereby resulting in reducing the number of small independent businesses and unemployment with loss of tax revenues." 73 P.S. § 203-2(1), (6) & (9). Thus, even under the analysis urged on us by the distributors, the Act would not violate the Commerce Clause.

The second prong of the distributors' argument is that the purposes of the Act could be served by means with a lesser impact on interstate commerce. First, we reiterate that the *Pike v. Bruce Church* test is whether the "burden imposed . . . is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. The availability of means of achieving the state interest that have a lesser impact on interstate commerce is only one consideration in the balancing process. The primary question is whether the legislation imposes undue burdens on interstate commerce.

Contrary to the distributors' assertions, the district court found that the burdens on interstate commerce were minimal. It held that the trade screening requirement had no effect on the release date of films and that costs incurred by the distributors in creating a trade screening print were insignificant. 614 F. Supp. at 1108. The prohibition on advances and guarantees was found not to have a significant impact on film rental or on the credit relationship between distributors and exhibitors. *Id.* at 1110-11. The court found that the limitation on the

length of runs caused no delay in release dates and no effect on rental terms. *Id.* at 1111-12. Finally, the district court concluded that the bidding regulations had no effect on the terms accepted by the distributors to license a film. *Id.* at 1112.

In light of the state interests that the district court found advanced by the Act, these burdens are not "clearly excessive." Indeed, the burdens identified in the district court's unchallenged findings are practically nonexistent. Thus, the distributors have not established either that Pennsylvania's purposes in enacting the Act were illegitimate or that the Act's burdens outweigh its benefits. We hold, therefore, that the Act does not violate the Commerce Clause.

II.

The First Amendment

In our prior decision in this case, we held that the Act was a content neutral "general regulatory statute." *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d at 812-13. As such, we held that its constitutionality under the First Amendment was governed by the test articulated in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), for generally applicable regulations "when 'speech' and 'nonspeech' elements are combined in the same course of conduct." Under *O'Brien*,

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

We remanded the case so that the district court could balance the burden the Act placed on First Amendment values and "the nature and weight of the state concerns which led to the Act's enactment." 683 F.2d at 813-14. On remand, the district court found that the Act "had little or no impact on First Amendment values," and that the state interests at stake were "substantial". 614 F. Supp. at 1118. The court concluded that the Act did not unconstitutionally burden First Amendment values, and, in fact, that it furthered interests protected by the First Amendment by requiring wider and more rapid distribution of films. *Id.* Thus, the court found the Act constitutional under *O'Brien*.

On appeal, the distributors do not argue that the Act is invalid under the *O'Brien* test. Rather, their argument is that the Act discriminates against an industry that engages in First Amendment activities, and, therefore, that it must meet the considerably more rigorous test set forth by the Supreme Court in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

In *Minneapolis Star*, the Court held that a state tax on the ink and paper consumed by periodicals, including newspapers, violated the First Amendment. The Court held that the tax discriminated against the press, and that such discriminatory taxation could not stand "unless the burden [on rights protected by the First Amendment] is necessary to achieve an overriding governmental interest." *Id.* at 582. According to the Court, "differential treatment [of the press], unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585. As an alternative ground for striking down the statute, the Court held that

its exemption of the first $100,000 for ink and paper used unconstitutionally singled out large newspapers. *Id.* at 591-92.

The distributors contend that the Pennsylvania Act singles out the motion picture industry, whose products are accorded First Amendment protection, for the same type of discriminatory treatment that the Court found unconstitutional in *Minneapolis Star*. According to the distributors, this discriminatory regulation is not justified by a "compelling" or "overriding" interest and is not the least restrictive alternative to achieve the state interests asserted.

An essential factor in the *Minneapolis Star* analysis is the inference of a goal to suppress expression. In our prior opinion in this case, we found that the Pennsylvania Act was not infected by such a goal. We stated that the Act was " 'clearly content-neutral' ", " 'trade practice legislation' ", and that it was directed at the motion picture industry " 'not because that industry communicates ideas, but rather because . . . the market structure of that industry is unique.' " 683 F.2d at 812 (quoting *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 432 (S.D. Ohio 1980), *aff'd in part, remanded in part*, 679 F.2d 656 (6th Cir. 1982)). This conclusion that the Act was prompted by trade practices associated with the distribution of motion pictures forecloses the argument that the Act was designed to single out the motion picture industry in order to suppress its expressive conduct. It is only the latter type of differential treatment that triggers the "compelling interest" analysis of *Minneapolis Star*.

Moreover, even if we were free to reconsider this question, appellants have not persuaded us that the Act is discriminatory in the same sense as was the differential taxation of the press that was ruled invalid in *Minneapolis Star*. The regulation of trade practices between distributors and exhibitors does not directly impinge

upon the expressive aspect of moviemaking activities, as did the state taxation of ink and paper used by the press in *Minneapolis Star*. Distribution of protected materials also falls within the ambit of the First Amendment but nothing in the language or structure of the Act suggests that the Pennsylvania legislature intended to suppress or regulate speech through regulation of certain trade practices.

The rationale of *Minneapolis Star* may require its extension beyond taxation to regulations that impose differential penalties directly on some First Amendment activity, *see, e.g., J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 495 (9th Cir. 1984), *rev'd. on other grounds sub nom. Brackett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794 (1985). Certainly, some regulation may in effect control the activity regulated as effectively as would taxation. However, in this case the district court found, after a full hearing, that the Act has had little, if any, impact on the First Amendment activities of the distributors. 614 F. Supp. at 1118. These findings are not clearly erroneous. They confirm our prior opinion that the Act in reality is not a discriminatory regulation of a First Amendment activity, but is instead, a content-neutral, regulatory statute that may have an incidental effect on some of the distributors' First Amendment activities.

Even after *Minneapolis Star*, such regulations are subject to the *O'Brien* test. *See Wayte v. United States*, 105 S. Ct. 1524, 1533 (1985). *See also Minneapolis Star*, 460 U.S. at 585 n.7 (referring to *O'Brien* approvingly as consistent with its analysis).

The district court held that the decision in *Minneapolis Star* would not, in any event, require striking this statute because it found that "the differential treatment of the movie industry in Pennsylvania's laws is justified by the special problems of that industry." 614 F. Supp. at

1119 n.29. *Minneapolis Star* suggested that even differential taxation of the press might be permissible if "the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." 460 U.S. at 585. In view of our decision that the regulation of trade practices singular to the distribution of motion pictures is not the type of differential treatment that requires application of the *Minneapolis Star* test, we need not reach the issue whether the counterbalancing state interest is of "compelling importance." We thus affirm the decision of the district court that the Act does not violate the First Amendment.

III.

The Copyright Act

The distributors also challenge the Act on the ground that it limits rights specifically granted the copyright holder by the Copyright Act of 1976. 17 U.S.C. §§101-914, and interferes with the Congressional purpose underlying that statute. The distributors argue, therefore, that the Act is preempted under the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2.[2]

In particular, the distributors argue that the Act obstructs the licensing of copyrighted films by requiring trade screening, which imposes a direct control on the timing of licensing by preconditioning it on the completion of the films; by prohibiting guarantees and advances, thereby impermissibly restricting the licensor's

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2. They do not suggest that the Act is preempted under the specific provision of the Copyright Act preempting state laws that purport to grant or destroy any rights "that are equivalent to any of the exclusive rights within the general scope of copyright." 17 U.S.C. § 301(a).

control and freedom to license; and by prohibiting exclusive first runs of motion pictures for more than 42 days, thereby precluding copyright holders from licensing exclusively for a term of their choice.

This argument by distributors is essentially a facial challenge to the Act on the ground of preemption. Even were the argument persuasive, this panel is not free to examine the issue because it has already been decided adversely to the distributors by the prior panel decision. In that opinion, we held that the first district court decision granting summary judgment for the distributors erroneously ruled that the provisions of the Pennsylvania Act challenged by the distributors here were preempted by the Copyright Act. We stated:

> The Act on its face contains no threat to the copyrights themselves: the Act does not take away from plaintiffs and give to another the right to reproduce the film, to prepare derivative works based on the film, to distribute the film, or to license its performance.

Associated Film Distribution Corp. v. Thornburgh, 683 F.2d at 816. In addition, we quoted the *Allied Artists* district court opinion for the proposition that "[t]he authority of the states to regulate market practices dealing with copyrighted subject matter is well-established." *Id.* (quoting *Allied Artists*, 496 F. Supp. at 447).

Thus, the earlier decision of this court conclusively established that the Pennsylvania Act was not facially preempted by the Copyright Act. At the same time, we recognized that in actual operation the Act might prevent or interfere with the goals of the Copyright Act and remanded for a factual determination by the district court of the Act's actual impact on federally created rights. *Id.* at 816-17.

On remand, the district court found that the various provisions of the Act have "had no effect on the incentive to make and distribute motion pictures;" do "not dilute the distributors' ownership rights in their films;" set "no limit on the financial terms at which films may be licensed;" do "not restrict the distributors' right to license its films;" and have "not impaired distributors' ability to release their films on the dates they desire." 614 F.Supp. at 1122-23. Thus, the district court found that "[p]laintiffs have not fulfilled their burden of demonstrating that the Pennsylvania Feature Motion Picture Fair Business Practices Law has interfered with the Federal Copyright Act." *Id.* at 1122.

The distributors do not contend that the findings of the district court are clearly erroneous. Instead, they make two arguments. The first is that when we remanded for a determination as to whether the prohibitions contained in the Act *in fact* stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress, we did not discuss the direct conflicts between the rights granted a copyright holder under 17 U.S.C. §106 and the restrictions imposed by the Act. They argue that because these restrictions are imposed not by legislation of general application but by a statute aimed solely at the copyright-protected motion picture distributors, the Act must fall on that basis alone. Brief for Appellants at page 32. We view this argument as nothing more than a reassertion by the distributors of their facial challenge which, as we have held, is not properly before us because of the prior panel decision.

The distributors' second argument is that the district court found that the Act created a sufficient burden on the rights protected by the Copyright Act to require a finding of preemption. The distributors point to the district court's findings that the prohibition on guarantees eliminated a source of income for the distributors. 614 F. Supp. at 1110; that the prohibition on advances deprives

the distributors of a means of protecting against credit risks, *id.;* that the limitation on the length of exclusive runs restricts the distributors' ability to use certain marketing strategies, *id.* at 1111; and that the trade screening requirement imposes some added costs on the distributors. *Id.* at 1108.

Even if we disregard the district court's conclusion that these burdens were insignificant, these findings show, at most, that the Act may affect, to some extent, the copyright owner's right to dispose of the film on the optimum terms. However, in our prior opinion we rejected the distributors' argument that a state trade regulation that affects the copyright owner's monetary return is thereby invalidated by the Copyright Act. In that opinion we quoted approvingly from the district court and court of appeals opinions in *Allied Artists Pictures Corp. v. Rhodes,* 496 F. Supp. at 446-47 and 679 F.2d at 662-63, including the Sixth Circuit's statement that there is no "authority for the argument that state trade regulation which affects distribution procedures and, indirectly, monetary returns from copyrighted property is invalidated implicitly or explicitly by the terms of the Copyright Act." 679 F.2d at 662-63 (approvingly quoted in 683 F.2d at 816). Since the burdens to which the distributors point relate only to the maximization of income, we find that their argument in this respect is also foreclosed by our earlier opinion.

We believe, however, that the distributors' contention that the limitation on the length of exclusive runs to 42 days interferes with the copyright owner's right to license exclusively for the life of the copyright merits particular comment. The district court found this interference to be "minimal" because the court interpreted the 42-day provision of the Act as permitting a distributor to enter into a series of exclusive contracts with the same exhibitor as long as no contract lasted longer than 42 days. 614 F.Supp. at 1123-24. Although

such an interpretation is advantageous to the distributors' desire to extend certain exclusive runs beyond 42 days, the distributors dispute the district court's interpretation of the Act.

The 42-day clause provides as follows:

> No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.

73 P.S. § 203-7.

We agree with the district court that "[t]his part of the statute was inartfully drafted." 614 F. Supp. at 1111 (footnote omitted). Nonetheless, we cannot construe this provision as did the district court. Its plain language requires a distributor to make provision "to *expand* the run to second run or subsequent run theatres within the geographical area" and to make available prints of its feature films "to . . . subsequent run theatres . . ." As the brief of exhibitor appellee Fox Theatres concedes, the Act requires that the exclusive first run must be expanded after 42 days "so that sub-run exhibitors will be able to offer to license the film and bring the picture to their communities sooner than they would have otherwise before the Act." Brief of Fox Theatres at page 12. We conclude that the district court's interpretation that "[t]he statute also does not prevent a distributor from entering into a series of exclusive licenses with one exhibitor as long as each license does not exceed 42 days." *Associated Film v. Thornburgh*, 614 F.Supp. at 1124, is erroneous as a matter of law.

There may be merit to the distributors' argument that the 42-day provision, when construed as limiting the distributors' right to license an exclusive run to 42 days, is preempted by the Copyright Act. However, such preemption would be apparent on the face of the statute and cannot be reconciled with the court's earlier decision that the Act is not facially invalid under the Copyright Act. As we have stated above, we are bound to that position.[3]

IV.

Conclusion

For the reasons set forth above, we will affirm the judgment of the district court.

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3. The writer of this opinion believes that the 42-day clause is inconsistent with the Copyright Act. The Copyright Act gives the owner of a copyright the exclusive right to distribute copies of the copyrighted work by rental, lease, or lending. 17 U.S.C. § 106(3); *see also* M. Nimmer, *Nimmer on Copyright* § 8.11 at 8-115 (1985). That right encompasses the grant of an exclusive license for a period as long as the copyright owner desires within the term of the copyright. Nonetheless, she feels compelled to join her colleages in affirming the district court decision because Internal Operating Procedure 8C of this court binds subsequent panels to reported panel opinions. Court in banc consideration is required to overrule a published opinion.

DISTRICT COURT OPINION OF AUGUST 24, 1981

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 80-1179

ASSOCIATED FILM DISTRIBUTION
CORPORATION, et al.
v.
The Honorable Dick THORNBURGH,
et al.

Aug. 24, 1981.

MEMORANDUM AND ORDER

TROUTMAN, *District Judge.*

The Pennsylvania Feature Motion Picture Fair Business Practices Law, Act No. 1980-14, 73 P.S. § 203-1 et seq. ("the Act"), was approved by Governor Thornburgh on February 29, 1980, and became effective on April 29, 1980. The Act comprehensively regulates the licensing of motion pictures for exhibition within the Commonwealth of Pennsylvania.

A number of other states have adopted legislation regulating certain aspects of motion picture licensing.[1] Most of the statutes that have been enacted in states other than Pennsylvania go no further than prohibiting the licensing of motion pictures without an advance

1. *See* Affidavit of Richard A. Fox, President, Fox Theatres Management Corporation ("Fox Affidavit") ¶ 16; Exhibit "B" to Answer of Budco Quality Theatres, Inc.

trade screening (thereby prohibiting a practice referred to in the Act as "blind bidding").[2] A few, such as Sections 1333.05 through 1333.07 of the Revised Code of Ohio, effective October 23, 1978 ("the Ohio statute"), regulate other licensing practices such as "guarantees," "advances," and bidding procedures.[3] The Pennsylvania Act contains additional provisions, such as Section 7, 73 P.S. § 203-7, regulating "exclusive first runs,"[4] and is more far-reaching than even the Ohio statute.

On March 24, 1980, plaintiffs, who include many of the major distributors and producers of motion pictures, initiated the present action. They ask that the Act be declared unconstitutional and that its enforcement be permanently enjoined. In their complaint, plaintiffs assert that the Act violates the Supremacy Clause, Article VI, cl. 2, the Commerce Clause, Article I, § 8, cl. 3, and the First, Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, § 7 and Article III, § 32 of the Constitution of the Commonwealth of Pennsylvania. Named as defendants are the Governor and Attorney General of the Commonwealth of Pennsylvania (who, by virtue of their offices, are charged with the execution and the enforcement of the laws of the Commonwealth), and two "exhibitors" as defined in § 3

2. *See Allied Artists Pictures Corp. v. Rhodes*, 496 F.Supp. 408, 437 (S.D.Ohio 1980), where District Judge Duncan observed that the other state regulatory statutes enacted as of the time of trial " 'basically prohibit blind bidding.' " In *Allied Artists*, Judge Duncan rejected an attack brought by many of the same plaintiffs upon the constitutionality of the Ohio statute. That decision is presently on appeal to the United States Court of Appeals for the Sixth Circuit (No. 80-3566).

3. *See* Fox Affidavit, ¶ 16.

4. Section 3 of the Pennsylvania Act defines a "run" as "[t]he continuous exhibition of a feature motion picture for a specified period of time." A "first run" is the first exhibition of a feature motion picture in the designated area and an "exclusive run" is "any run limited to a single theatre in a defined geographical area."

of the Act, 73 P.S. § 203-3, Budco Quality Theatres, Inc. ("Budco") and Fox Theatres Management Corporation ("Fox").[5] The exhibitor defendants operate two of the major theatre circuits or chains in this region.[6] All defendants filed answers to the complaint.[7]

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5. The powers of the Governor and Attorney General are more fully set forth in Article 4, § 2 of the Constitution of the Commonwealth and 71 P.S. § 61 *et seq.* and 71 P.S. § 732-204.

Section 3 of the Act, 73 P.S. § 203-3, defines an "exhibitor" as "[a]ny person engaged in the business of operating one or more theatres in this Commonwealth . . ." and a "distributor" as "[a]ny person engaged in the business of renting, selling or licensing feature motion pictures to exhibitors."

6. Budco operates 55 theatres with 99 screens in Eastern Pennsylvania, Maryland, Delaware, and Southern New Jersey, and Fox operates 28 theatres with 48 screens in Pennsylvania, Maryland, and Delaware. Fox Affidavit, ¶ 1; Affidavit of Claude J. Schlanger ("Schlanger Affidavit"), ¶ 1.

7. With its answer, defendant Budco counterclaimed against plaintiffs, alleging violations of § 1 of the Sherman Act. By agreement of the parties, plaintiffs have not answered the counterclaim. Plaintiffs filed a motion for severance of the counterclaim or, in the alternative, for a separate trial and a stay of all proceedings in connection with it. Together with its answer, Budco also demanded a trial of the entire case by jury, both the declaratory action and counterclaim, and plaintiffs have moved to strike that demand.

The exhibitor defendants have served all plaintiffs with interrogatories and requests for production of documents relating both to the case-in-chief and to the counterclaim. The discovery sought by Fox has been stayed by court-approved stipulation. A motion for protective order with regard to Budco's discovery requests is presently before this Court, as is an appeal from Magistrate Powers' order of September 22, 1980 denying plaintiffs' earlier motion for a protective order limiting discovery to the issues raised by this motion.

On July 15, 1980 plaintiffs filed the present motion for summary judgment, accompanied by affidavits, asking that the Act be declared unconstitutional on its face.[8] Defendants' responsive memoranda are also supported by affidavits.[9] Oral argument was heard on March 27, 1981, and the motion is ripe for decision.

Stripped to the essentials, the issues before this Court are, *first*, whether the Act's regulation of the licensing process through which copyrighted motion pictures are made available to the theatre-going public violates the First Amendment and the Supremacy Clause; and, *second*, whether any material fact issues exist that would bar that determination on motion for summary judgment.[10] Careful review of the pleadings, the affidavits, and the extensive and thorough briefs submitted by the parties demonstrates that plaintiffs' First Amendment and Supremacy Clause claims may be decided on this motion and that the Act conflicts on its face with rights protected by those constitutional provisions.

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8. Plaintiffs' motion for summary judgement was accompanied by the affidavits of Leo Greenfield, Vice President for Marketing and Distribution, Associated Film Distribution Corporation ("Greenfield Affidavit") and Norman Levy, President of 20th Century Fox Entertainment, a division of 20th Century Fox Film Corporation ("Levy Affidavit").

9. Defendants submitted the Fox and Schlanger affidavits.

10. Decision of the First Amendment issues disposes of this motion. Defendants have basically and substantially conceded that plaintiffs' Supremacy Clause and copyright claim may be decided as a matter of law. Because of the importance of the question whether the Act's regulation of licensing motion pictures for exhibition impermissibly interferes with federal copyright regulation, it is also discussed in this opinion. Plaintiffs' claims under the Due Process clause and the Pennsylvania Constitution need not be decided because the foregoing is dispositive. As to the Commerce Clause issues, additional facts are necessary for their determination under the "balancing" test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970).

I.

THE PROVISIONS OF THE ACT.

The Act directly regulates the licensing process through which copyrighted motion pictures, and the ideas they express, are made available to theatre audiences, prohibits certain terms in license agreements between distributors of motion pictures and exhibitors, and requires that certain procedures be followed.[11] There exist both obvious similarities to and differences from the provisions of the Ohio statute.

Section 2 of the Act sets forth the sole legislative finding, namely, that "the licensing and distribution of feature motion pictures to theatres in this Commonwealth, including the rights and obligations of distributors and exhibitors, vitally affects the general economy as

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11. Motion pictures are copyrighted forms of creative expression. They are marketed by means of copyright licenses extended by distributors of films, located in states other than Pennsylvania, to local exhibitors. *See* Levy Affidavit, ¶¶ 2-3, 6; Greenfield Affidavit, ¶¶ 2, 4-5. As a result of the landmark Supreme Court decision in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948), and the subsequent divestiture order in *United States v. Paramount Pictures, Inc.*, 85 F.Supp. 881 (S.D.N.Y.1949), *aff'd sub nom. Loew's Inc. v. United States*, 339 U.S. 974, 70 S.Ct. 1032, 94 L.Ed. 1380 (1950), motion picture distributors own and operate no theatres at which motion pictures are exhibited, in Pennsylvania or elsewhere. *See* Budco Answer, ¶ 4. They achieve access to their theatre audiences through theatres operated by such exhibitors.

Both before the Pennsylvania Act was passed and at the present time, distributors offer, and exhibitors bid or negotiate for, licenses to exhibit motion pictures within regional or metropolitan marketing areas. Levy and Greenfield Affidavits, ¶¶ 9, 23. Revenues from the licensing of copyrighted motion pictures constitute a significant portion of the return received by the distributors. The terms of a copyright license are the means by which the distributor and exhibitor apportion the risks and returns from exhibition of motion pictures. *See* Levy and Greenfield Affidavits, §§ 5, 7, 8, 27; Fox Affidavit, ¶¶ 3,7.

well as the access of the public to works of artistic expression and opinion. . . ." and asserts that regulation of licensing and relationships between motion picture distributors and exhibitors is a valid exercise of the police power. Ten purposes purportedly served by the Act are also listed in that section.[12] The Ohio statute contains no statement of any finding or purposes.

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12. These purposes, as stated, are:

"(1) [to] insure unabridged access for the public to artistic expression and opinion in feature motion pictures at reasonable prices and at many different locations;

"(2) [to] avoid undue control of the exhibitors by the distributors;

"(3) [to] foster vigorous and healthy competition in offering feature motion pictures for the benefit of the public by prohibiting practices through which fair and honest competition is restrained, destroyed or inhibited;

"(4) [to] promote the wide geographical dissemination at reasonable prices to the public of ideas, opinions and artistic expression in feature motion pictures;

"(5) [to] prevent delay in the exhibition of feature motion pictures to the public in theatres playing subsequent to the first run showing;

"(6) [to] prevent theatres from unnecessarily going out of business, thereby resulting in reducing the number of small independent businesses and unemployment with loss of tax revenues and other undesirable consequences;

"(7) [to] prevent unfair deceptive acts or practices and unreasonable restraints of trade in the business of distribution and exhibition of feature motion pictures within the Commonwealth;

"(8) [to] promote fair and effective competition in that business;

"(9) [to] benefit the movie going public by limiting the long and extensive first runs so that additional theatres, in a given area, may also exhibit the same feature motion picture and at possibly a lower admission price; and

"(10) [to] prohibit blind bidding by insuring that exhibitors have the opportunity to view a motion picture and know the contents before committing themselves to exhibit it in their communities."

Section 3 defines the terms used in the Act. Its definitions closely resemble the definitions used in the Ohio statute.

Section 4 absolutely prohibits negotiating for, bidding for, or agreeing to a license for the exhibition of a motion picture within Pennsylvania without a prior trade screening within the Commonwealth (that is, it prohibits "blind bidding"). The Ohio statute has the identical practical effect.[13] An important effect of this prohibition is that no negotiation for a license agreement between a distributor and an exhibitor may begin until the picture is in final form for exhibition. Although Section 4 requires a trade screening to take place, it does not require exhibitors to attend a trade screening. Like other sections of the Act, Section 4 may not be waived. The Ohio statute also prohibits any waiver of the comparable section.

Section 5 absolutely prohibits all guarantees of minimum film rental when a license agreement provides for payment to the distributor based in whole or in part on a percentage of attendance or box office receipts.[14] No

13. Sections 1333.06(A) and 1333.07(B), (C) of the Ohio statute say that distributors may not engage in "blind bidding," and that they must notify invited bidders of scheduled trade screenings. Ohio includes "negotiation . . . prior to a trade screening . . ." in its definition of "blind bidding." § 1333.05(1).

14. The "percentage of gross receipts" represents the percentage figure of the box office receipts that the distributor would receive as rental. This was, and still is, the most common rental basis and this means of obtaining rental is not affected by the Act. A certain figure is set aside for the exhibitor to cover "house expenses." The distributor receives a varying proportion of the net remainder, such as 90%, with the exhibitor retaining the remaining 10%. As the exhibition of a film continues, the exhibitor's percentage normally increases and the distributor's declines. Levy and Greenfield Affidavits, ¶ 14; Schlanger Affidavit, ¶ 17. A "guarantee" would often be coupled with a percentage rental. A guarantee established a minimum rental that the distributor would receive and the exhibitor would pay, whatever the receipts were at the box office. Levy and Greenfield Affidavits, ¶ 14; Fox Affidavit, ¶ 7.

such license agreement may be conditioned upon or contain any guarantee. By contrast, the Ohio statute, § 1333.06(B), only prohibits a distributor from *demanding* that a license agreement contain a guarantee of a minimum payment. Although Section 5 prohibits a guarantee in the case of a percentage rental, it does not prohibit a flat rental, nor does it prohibit a guarantee with a flat rental. Section 5 also provides that provisions for any such guarantees are void and that any purported waiver of the prohibition is void.

Section 6 of the Act prohibits any and all advance payments of film rentals by an exhibitor to a distributor.[15] A license agreement may not provide for any advance payment prior to exhibition of a motion picture, either as security for performance of the license agreement or as an advance on rental payments due under the agreement. The Ohio statute, § 1333.06(C) only prohibits a distributor from requiring a license that provides for an exhibitor's advancing any money for security or as an advance payment on rental due more than 14 days prior to exhibition of a motion picture. Like Section 5, Section 6 provides that any waiver is void and unenforceable (the Ohio statute also prohibits waiver).

Section 7 prohibits "exclusive first runs" or "exclusive multiple first runs" of motion pictures for more than 42 days "without provisions to expand the run to second run or subsequent run theatres within the geographical area. . . ."[16] A distributor may not agree to show a motion picture on an exclusive basis for more than 42 days. An exhibitor with theatres in prime locations may show

15. Advance payments were partial rentals paid in advance before the initial exhibition of a motion picture. Levy and Greenfield Affidavits, ¶ 14; Schlanger Affidavit, ¶ 9(G); Fox Affidavit, ¶ 8.

16. 1616. Before the Pennsylvania Act was passed, the term or time period of the license would be stipulated in the license agreement and included in the negotiations between distributor and exhibitor. Levy and Greenfield Affidavits, ¶ 15; Fox Affidavit, ¶ 5.

the picture for more than 42 days, but may not longer show it "exclusively" and the film must be "made available," or rebid.[17] The Ohio statute imposes no such limitation.

Section 8 establishes certain bidding procedures that closely resemble those required in Ohio. It does not make competitive bidding mandatory, but sets forth requirements that must be followed if bidding is initiated:[18]

Section 8(a) requires that certain information be provided to bidding exhibitors, including the identity of all bidders.

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17. Although the Schlanger Affidavit, ¶ 15, speaks of "unduly long guaranteed exhibition runs," and ¶ 5 of the Fox Affidavit asserts that exhibitors are forced to play motion pictures for "long periods of time," the Act does not bar long runs, only exclusivity.

18. Before the Act was passed, licensing of motion picture films for exhibition was carried out in Pennsylvania in several ways, including direct negotiation with individual exhibitors and the distributor's solicitation of bids from exhibitors in a particular market area. Levy and Greenfield Affidavits, ¶ 10; Exhibit "A" to Budco's Answer. On some occasions, the distributor would reject all bids and would then undertake to negotiate with one or more exhibitors who had bid or with entirely different exhibitors. Levy and Greenfield Affidavits, ¶ 10; Schlanger Affidavit, ¶¶ 9(D), 9(E). The information normally provided on a bid solicitation included the title of the film, identification of the talent involved (the actors, director, writer, producer, etc.), the type of film, and a general plot summary. Exhibit "A" to Budco's Answer; Schlanger Affidavit, ¶ 9(A). When the license agreement was negotiated or bid before the motion picture was completed or available for viewing (or, on occasion, even when the film was complete), the motion picture would be licensed without an advance screening; that is to say, it would be "blind bid." Exhibit "A" to Budco Answers; Levy and Greenfield Affidavits, ¶ 17; Schlanger Affidavit, ¶ 9(A). Fox Affidavit, ¶¶ 4, 5; Section 3 of the Act, 73 P.S. § 203-3. On other occasions, when a film was completed in advance of licensing, exhibitors might be invited to attend a "trade screening," or a screening in advance of licensing. Levy and Greenfield Affidavits, ¶¶ 17, 20; Fox Affidavit, ¶¶ 10, 20.

Section 8(b) requires that if the motion picture has not been trade screened, the distributor shall establish a date, time, and location of a trade screening in the bid literature.

Section 8(c) requires that all bids are to be submitted in writing and opened at the same time, in the presence of those exhibitors or their agents who submitted bids and who are present. Unlike Ohio's §1333.07(D), it does not require any exhibitor to be present.

Section 8(d) requires that a distributor make available to an exhibitor within 60 days after bids are opened any bid made for the same run by any other exhibitor — even if all bids submitted were rejected. The distributor is also required to notify in writing each exhibitor who submitted a bid for that run of the terms accepted and the identity of the successful bidder.

Section 8(e) provides that, if all bids are rejected, a distributor, once having issued invitations to bid, may not enter into a license agreement except by means of the bidding process specified in Section 8. In other words, he may not reject all bids and then enter into negotiations, nor may he withdraw the film from the market, but instead, he must continue the bidding process.

Section 10 of the Act provides to exhibitors (but not to distributors), a private right of action. No such right is provided in Ohio. Any exhibitor may sue a distributor, or an exhibitor, or both, for violations of the Act in a Court of Common Pleas for damages or injunctive relief and is entitled to recover costs, including reasonable attorney's fees. A distributor has no comparable right of action.

Because of the similarities and because of the many significant differences between the Act and the Ohio

statute, this Court will examine afresh the issues presented by plaintiff's constitutional challenge, in light of Judge Duncan's thorough and thoughtful opinion upholding the constitutionality of that statute.

II.

THE STANDARDS FOR SUMMARY JUDGMENT.

The principle that summary judgment may be entered when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" is well-established. Rule 56(c), Federal Rules of Civil Procedure. This Court recently analyzed the principles that govern under Rule 56 in *Hollinger v. Wagner Mining Equipment Corp.*, 505 F.Supp. 894, 896-898 (E.D.Pa.1981):

> "Characterized as both a 'drastic' and 'extreme' remedy, summary judgment should be used 'sparingly,' for it is a 'lethal weapon,' eliminating the opportunities to assess the demeanor and credibility of witnesses as well as to examine and cross-examine them in front of a jury. However, where no genuine issues of material fact exist and as a matter of law the moving party deserves entry of judgment, the Court should render it in order to eliminate sham issues of fact, to allow the Court to pierce the pleadings and assess the proof to determine whether a genuine need for trial exists, and to avoid waste of time and resources of both the litigants and the Court where trial would be a useless formality."

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> "Courts exercise discretion only in denying summary judgment in a particular situation and use fastidious caution in granting it. The responsibility belongs to the Court to review all facts to determine whether a genuine issue exists as to any material fact, *which may be defined as one which affects the outcome of the litigation.*" [Emphasis added: citations and footnotes omitted].

This Court is required to make the following three-step analysis. *First*, in examining the record, it must resolve all doubts against the moving party, upon whom the initial burden of justifying the motion falls, and construe the motion in the light most favorable to its opponents, *see Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

Second, it must ascertain whether disputes exist with regard to any material fact, defined as a fact that "affects the outcome of the litigation." *See Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977), *cert. denied* 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748; *Goodman v. Mead, Johnson & Co.*, 534 F.2d 566 (3d Cir. 1978). While summary judgment may not be granted if there exist issues of material fact relevant to the Court's decision of the issues presented, the Court must not search for the existence of such issues. *Lockhart v. Hoenstine*, 411 F.2d 455 (3d Cir. 1969), *cert. denied*, 396 U.S. 941, 90 S.Ct. 378, 24 L.Ed.2d 244 (1969).

Third, the Court must determine whether "a genuine need for trial" exists with regard to the decision of the legal issues presented or whether any purported factual questions are "largely illusory and a trial would be a 'useless formality.' " *See Cousins v. Yaeger*, 394 F.Supp. 595 (E.D.Pa. 1975). It may not refuse to grant summary judgment if the purported factual disputes alleged by a party are not material to decision of the legal issues in the

case. *See British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied* 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed2d 241 (1979), *reh. denied* 441 U.S. 968, 99 S.Ct 2420, 60 L.Ed.2d 1074 (1979) (deposition evidence that plaintiff tried to introduce was not probative with regard to the ultimate issue, the cause of an airplane accident, and did not create any conflict concerning a material fact despite the obvious presence of a factual dispute). That an action involves constitutional questions does not change the standard to be applied. *See Village of Schaumburg v. Citizens For A Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), *reh. denied* 445 U.S. 972, 100 S.Ct. 1668, 64 L.Ed.2d 250 (1980) (Supreme Court affirmed the propriety of granting summary judgment for plaintiffs in a case involving interference with rights protected by the First Amendment).

Applying those standards to this case, I conclude that, with regard to plaintiffs' First Amendment and Supremacy Clause claims, there are no *material* facts in dispute and there exists no "genuine need for trial."

Defendants urge this Court to deny plaintiffs' motion because of the existence of two categories of facts which, they argue, are both disputed and material, namely (1) the alleged relative disparity in economic power, size, and concentration between distributors and exhibitors, and the distributors' purported abuse of that disparity, which, defendants claim, provide justification for the Act; and, (2) the need factually to ascertain the extent and nature of the burdens that the Act may impose on constitutionally protected activities. It is true that these "facts," particularly the economic "facts," are vigorously

disputed by the parties.[19] However, questions that pertain to them do not require resolution in order to decide the legal issues presented in this motion. The real disputes between the parties in this case are not factual but legal and concern the standards of analysis to be applied to the Act and to plaintiffs' constitutional claims.

With regard to disparity in bargaining power and size between distributors and exhibitors, concentration in motion picture distribution and abuse of superior bargaining power by distributors, even if each and every fact put forward by defendants were assumed to be accurate for purposes of the instant motion for summary judgment, *see Adickes v. Kress, supra,* a contrary decision concerning the constitutionality of this Act on First Amendment and Supremacy Clause grounds would not be compelled. The factual issues that defendants contend exist might be material with regard to a more narrowly drawn statute, like Ohio's, whose purpose was found by Judge Duncan to be to "effect a better balance

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19. The Schlanger and Fox affidavits purport to describe plaintiffs' "economic concentration" and control of the distribution of motion pictures and characterize plaintiffs' practices before the Act was passed as abuses of that superior bargaining power. Schlanger Affidavit, ¶¶ 5, 6; Fox Affidavit, ¶ 3. Plaintiffs, in their reply memorandum, vigorously contest these assertions. Thus, the "fact" of relative economic power and its implications is very much at issue. However, it is not material to the issue of the facial unconstitutionality of the Act under the First Amendment and the Supremacy Clause.

By contrast, although defendants have questioned the relevance of many of plaintiffs' factual assertions, they have not denied them in their affidavits. Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial." Defendants' efforts to create the appearance of an issue of fact do not meet the criteria of Rule 56(e).

of bargaining power between exhibitors and producer-distributors. . . ." by correcting purported abuses of that bargaining power, *Allied Artists Pictures Corp. v. Rhodes, supra,* 496 F.Supp. at 429.[20] However, Pennsylvania's more comprehensive Act must be judged by more rigorous standards than Ohio's comparatively limited regulation and the economic facts at issue are not material to the "compelling" or "significant" public purposes required to justify it.

In its broad regulation of the copyright licensing process under which motion pictures, which contain expression protected by the First Amendment, are made available to theatre audiences, the Pennsylvania Act indisputably affects rights protected by the First Amendment and granted under the federal Copyright Act, 17 U.S.C. §101 *et seq.* See Sections III and IV, *infra.* Therefore, it must serve "compelling" or "significant" public purposes. *See, e. g., First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978) *reh. denied* 438 U.S. 907, 98 S.Ct. 3126, 57 L.Ed.2d 150 (1978). The facts that defendants assert are "material" are relevant to the purpose of "weighting a balance. . . . ," 496 F.Supp. at 431, between private economic entities, but such equalizing of bargaining relationships between business enterprises has never been the kind of "compelling" purpose required to justify limitations upon rights protected by the First Amendment or granted by federal legislation and protected by the Supremacy Clause. Economic "facts"

20. In *Allied Artists Pictures Corp. v. Rhodes, supra,* 496 F.Supp. at 429, Judge Duncan applied the liberal "due process" tests of such cases as *United States v. Carolene Products Co.,* 304 U.S. 144, 152, 53 S.Ct. 778, 783, 82 L.Ed. 1234 (1938) and *Nebbia v. New York,* 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934) to the more limited Ohio statute, asking only if there existed "a rational nexus between the legitimate object and the means chosen to achieve it . . . .," 496 F.Supp. at 431. More stringent examination of Pennsylvania's comprehensive enactment is required.

that might be relevant to that legitimate regulatory purpose are not material to the more compelling purposes required to sustain the constitutionality of the Pennsylvania Act.

Furthermore, assuming *arguendo* that the purpose of correcting abuses due to "economic disparity" were sufficiently compelling to justify some regulatory intrusion into rights protected by the First Amendment or some limitation on a right granted by Federal copyright legislation, the Pennsylvania Act's comprehensive combination of regulations is overbroad in its scope and goes beyond serving any such assumed legitimate purpose. The Act entirely and absolutely eliminates certain provisions from license agreements — regardless of the existence of any abuses or the existence of economic disparity between the parties or whether the practices were coerced or mutually sought. It does so by prohibiting a broad spectrum of prior practices in combination, although defendants themselves assert that practices such as guarantees were injurious primarily because combined with "blind bidding."[21] The Act does not narrowly address itself to specific abuses, as is required when expression is affected even indirectly, *see* Section III, *infra*, but simply prohibits a number of licensing terms outright, in combination. For this reason, as well, although the economic facts defendants have set forth might be relevant to a more limited statute like Ohio's that purports to correct specific abuses more precisely, they are not material to the constitutional issues presented by the Pennsylvania Act, which imposes blanket prohibitions.

Citizens For A Better Environment v. Village of Schaumburg, 590 F.2d 220 (7th Cir. 1978), *aff'd sub nom. Village of Schaumburg v. Citzens For A Better Environment, supra*, is directly applicable to and disposes

21. *See* Fox Affidavit, ¶¶ 4, 5, 7.

of defendants' argument that facts concerning plaintiffs' practices before the Act was passed (about which there is dispute) are material and must be developed through discovery and a trial. In that case, plaintiff brought a declaratory attack under the First Amendment on a village ordinance that imposed a blanket requirement that 75% of the proceeds of charitable solicitation be used directly for the charitable purposes of the soliciting organization — regardless of the nature of the organization — regardless of the nature of the organization or plaintiff's activities or the existence of any abusive practices by plaintiff. The District Court held that the "75% requirement" was an impermissible, although indirect, restraint upon plaintiff's exercise of its First Amendment freedoms. On appeal, the village asserted that the entry of summary judgment was improper because there existed issues of material fact concerning plaintiff's actual practices. The Court of Appeals (and subsequently, the Supreme Court) agreed with plaintiff that those fact issues, including characterizations of plaintiff's activities, were irrelevant to the question of the overbroad ordinance's constitutionality on First Amendment grounds.

As was true in *Schaumburg*, factual questions concerning plaintiffs' practices or the alleged economic disparity between the parties are not material to decision of the Act's constitutionality. The Feature Motion Picture Fair Business Practices Law, like the ordinance in *Schaumburg*, imposes blanket (and nonwaivable) prohibitions on certain business practices in combination — all guarantees, all payment in advance of exhibition, all advance negotiation prior to a trade screening, and various other practices are simply forbidden, even if such practices have not been coerced, and regardless of any abuse of any sort by a distributor, or of whether more narrowly drawn or fewer prohibitions might correct the abuse.

As to facts concerning the Act's burdens on constitutional rights (*see* Section III(B), *infra*), the relevant cases in the First Amendment and the Supremacy Clause areas demonstrate that the question of the Act's constitutionality may be determined from the face of the legislation without development of additional facts. The legal standard in those contexts is whether a statute presents the risk of infringing upon protected rights. Proven interference with activities protected by the First Amendment or that are the subject of comprehensive federal regulation is not a necessary prerequisite to a determination of facial unconstitutionality; the statute's potential for harm on its face is determinative. *See Village of Schaumburg v. Citizens For A Better Environment, supra,* 444 U.S. at 632, 100 S.Ct. at 833 ("75% requirement" created the risk of limiting advocacy of particular views); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 257, 94 S.Ct. 2831, 2839, 41 L.Ed.2d 730 (1974) (risk that requirement that newspapers provide access for views opposing editorials might cause newspapers to limit their editorials to less controversial matters); *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965) (striking a state censorship statute that created the risk of delay in exhibiting motion pictures and thus, of suppressing protected expression); *Grosjean v. American Press Co.,* 297 U.S. 233, 250-51, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936) (state license tax on advertising stricken because of the risk that it would inhibit publication); *Crane Co. v. Lam,* 509 F.Supp. 782, CCH Fed.Sec.L.Rep. ¶ 97,896 (E.D.Pa.1981) (preliminary injunction granted against Pennsylvania Takeover Disclosure Act because of its potential for substantial interference with a federal statute).

Many facts concerning the relative economic status of the parties, plaintiffs' practices, or the effects of the Act might be ascertained in discovery or through a

lengthy trial. However, further discovery and factual development of these myriad (but non-material) facts would not affect decision of the First Amendment and Supremacy Clause issues.

III.

THE ACT'S INTERFERENCE WITH RIGHTS PROTECTED BY THE FIRST AMENDMENT.

Decision of plaintiffs' First Amendment claims disposes of this motion. Although the Act does not directly command or prohibit any type of content, it comes within the scope of the cases that have stricken indirect restraints upon content. It creates risks of restricting protected expression; its purposes do not meet the standard that the cases require, namely, that they be "substantial" or "compelling;" and its prohibitions are not drawn with the precision that is required of a state legislative regulation that affects dissemination of protected expression even indirectly.

A. *The Act imposes indirect restraints upon a protected activity*

It is well-established that motion pictures are a form of creative expression protected by the First Amendment, although they are not "necessarily subject to the precise rules governing any other particular method of expression. . . ." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952), and although this protection is not absolute. *Times Film Corp. v. Chicago*, 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961), *reh. denied* 365 U.S. 856, 81 S.Ct. 798, 5 L.Ed.2d 820. With the exception of obscenity, which is not involved in this case, this protection applies regardless of the film's content. *See e. g., Erzoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d

125 (1975); *Interstate Circuit v. Dallas*, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968).

The fact that motion pictures are commercial endeavors does not alter their protected status. *See Joseph Burstyn, Inc. v. Wilson, supra,* 343 U.S. at 501-502, 72 S.Ct. at 780. In fact, recent cases have made it quite clear that so-called "commercial" speech engaged in by corporate entities is entitled to First Amendment safeguards. *See Metromedia Inc. v. City of San Diego,* ____U.S.____, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *Consolidated Edison Co. of New York v. Public Service Comm'n.*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407, 1419, 55 L.Ed.2d 707 (1978). *See also Buckley v. Valeo*, 424 U.S. 1, 16, 96 S.Ct. 612, 633, 46 L.Ed.2d 659 (1976) ("this Court has never suggested that the dependence of a communication on the expenditure of money operates itself. . . . to reduce the exacting scrutiny required by the First Amendment."). Motion pictures, of course, cannot be equated with mere "commercial speech" such as advertisements, commercial billboards, billing inserts, or the like, *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), *on remand* 51 N.Y.2d 817, 433 N.Y.S.2d 426, 413 N.E.2d 365, because, as creative expressions of ideas, they come directly within the ambit of the First Amendment. *Erzoznik v. City of Jacksonville, supra; Joseph Burstyn, Inc. v. Wilson, supra.*

The Act whose constitutionality is at issue in the present case obviously does not censor the content of motion pictures or require producers or distributors to adhere to one idea at the expense of others, or forbid them to make or to distribute any particular type of motion picture. In that sense, defendants are correct when

they describe the Act as "content-neutral" and distinguish it from censorship regulations designed to suppress speech because of its content. *See Allied Artists Pictures Corp. v. Rhodes, supra,* 496 F.Supp. at 432. Obviously, the Act is not identical to an ordinance prohibiting live entertainment (*see Schad v. Borough of Mt. Ephraim,* ____*U.S.*____, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981)), or to a regulation forbidding the sale of a particular type of book to young people (*see Bantam Books v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)), or to a content-based restriction on what may be shown in a particular forum. *See, e. g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 488 (1975) (striking down prohibition against use of municipal theatre for a performance of the musical "Hair").

However, the conclusion that the Act does not regulate content, but, instead, affects the distribution and exhibition of all motion pictures in Pennsylvania, regardless of content, does not dispose of plaintiffs' claims. The Act comprehensively and directly regulates the licensing process — the means by which all motion pictures, and the ideas they contain, are made available to the theatre-going public in the Commonwealth — and, on its face, creates risks of limiting expression. The cases hold with unanimity that, even if a statute or ordinance indirectly restrains speech, it is unconstitutional if it has that effect and does not further "an important or substantial governmental interest . . . unrelated to the suppression of free expression . . ." and "the incidental restriction on alleged First Amendment freedoms is 'no greater than is essential to the furtherance of that interest.' " *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), *reh. denied sub nom. O'Brien v. United States,* 393 U.S. 900, 89 S.Ct. 63, 21 L.Ed.2d 188. The "exacting scrutiny" required by the

First Amendment cases "is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct governmental action, but indirectly as an unintended but inevitable result of the government's conduct. . . ." *Buckley v. Valeo, supra,* 424 U.S. at 64-65, 96 S.Ct. at 656 (holding unconstitutional a "content-neutral" statute that impinged upon freedom of speech by imposing expenditure limitations upon candidates for public office).

Quite recently, the Supreme Court demonstrated the continuing validity of this principle in *Village of Schaumburg v. Citizens For A Better Environment, supra,* 444, U.S. at 632, 100 S.Ct. at 833. It held there that an ordinance's imposition of a flat percentage requirement on the use of proceeds from door-to-door solicitation, although it was not enacted to limit the protected solicitation and was therefore "content-neutral", was unconstitutional because it might limit "informative and perhaps persuasive speech seeking support for particular causes or for particular views. . . ." and presented the risk that "without solicitation the flow of such information and advocacy would likely cease." *Ibid.*

The courts have made it clear that the First Amendment's protection extends to the means of distribution of protected expression as well as to protection of content itself. *See, e. g., Philadelphia Newspapers, Inc. v. Borough Council of Swarthmore,* 381 F.Supp. 228, 240 (E.D.Pa.1974) (holding that newspaper boxes along public streets are constitutionally protected); *Lovell v. Griffin,* 303 U.S. 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938); *Grosjean v. American Press Co., supra,* 297 U.S. at 251, 56 S.Ct. at 449. The Pennsylvania Act regulates the licensing process by which protected expression is made available to the public, just as the ordinance at issue in *Philadelphia Newspapers, Inc. v. Borough Council of Swarthmore, supra,* regulated the means of distribution of newspapers.

Defendants' argument that, because the Act only regulates the licensing process, not the content of films themselves, it does not violate the First Amendment, must therefore be rejected. Their formulation ignores the meaning of the cases discussed above — namely, that non-traditional or indirect regulation of the means of communicating protected speech may affect the ability to communicate those ideas. *See, e. g., Grosjean v. American Press Co.*, 297 U.S. at 244-45, 56 S.Ct. at 446-47 (state license tax directed at newspapers violated the First Amendment because it might have limited circulation). Recognizing that courts must be alert to unusual restrictions upon First Amendment rights that appear innocently clothed as "indirect" restraints, the Supreme Court, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256, 94 S.Ct. 2831, 2838, 41 L.Ed.2d 730 (1974), rejected a statutory requirement that newspapers make available space for reply to controversial editorials and wrote:

> "The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." [Footnotes and citations omitted].

Even if defendants' characterization of the Act's effects on protected speech as not only "indirect" but merely "peripheral" and "incidental" were correct, that would not end the inquiry, for "[e]ven where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression." *Schad v. Borough of Mt. Ephraim, supra, ____ U.S. at ____* n.7, 101 S.Ct. at 2183 n.7

(1981) [*citing United States v. O'Brien, supra,* 391 U.S. at 376-377, 88 S.Ct. at 1678-1679.]. When the standards for analyzing indirect restraints upon communication are applied to the risks that the Act's provisions create on their face — risks of delays in licensing and of financial uncertainty as well as other burdens — it must be concluded that its restraints, although indirect, affect the dissemination of protected expression in motion pictures in a manner that violates the First Amendment.

B. *The Act creates the risk of inhibiting protected expression*

On its face, the Act creates the risk of delay in licensing and of shifting financial burdens and uncertainties — indeed, defendants argue in their affidavits that the latter is one of the Act's purposes.[22] These risks, which threaten expression itself and its dissemination in motion pictures, are inherent and unavoidable in the statutory scheme and are clear on the face of the Act.

Defendants correctly assert that actual proof of the Act's impact upon the financing, booking, or release of motion pictures can only be ascertained after discovery and possibly, after a trial. However, in making this assertion, they ignore the well-established principle that the risk of infringement of First Amendment rights is sufficient to establish a statute's burdens, whether the regulation in question affects expression directly or indirectly. Proof of impact is not essential to decision of this motion on First Amendment grounds. *See, e.g., Village of Schaumburg v. Citizens For A Better Environment, supra,* 444 U.S. at 632, 100 S.Ct. at 833 ("75% requirement" created the risk of limiting the seeking of support for particular causes). To declare a statute or ordinance unconstitutional on First Amendment grounds,

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22. *See, e.g.,* Schlanger Affidavit ¶ 10.

actual proof of infringement of expression is not necessary. For example, in *Murdock v. Pennsylvania,* 319 U.S. 105, 114, 63 S.Ct. 870, 875, 87 L.Ed. 1292 (1943), the Supreme Court observed that a license tax on distribution of religious literature was "likely to restrict petitioners' religious activities. On their face, they are a restriction of the free exercise of those freedoms which are protected by the First Amendment." *See also Schneider v. State,* 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939) (involving "indirect" time and place restrictions on leafletting which did not impose a total ban on the protected activity).

Some examples will illustrate the way these considerations apply to the risks created by the instant Act. As to delay, Sections 4, 7, and 8, as well as others, create on their face the risk of delay in licensing. Under Section 4, there may be absolutely no negotiation or solicitation of bids in Pennsylvania before a picture has been trade-screened — and, obviously, the film cannot be trade-screened before it is completed. The effect of Section 4 inevitably must be to delay licensing until after completion of the film — no matter how much information is available to an exhibitor, or regardless of the exhibitor's size, or how intensely it wants to exhibit a given picture based on its knowledge of the talent or subject matter.[23] These requirements, on their face, create the risk of delay in licensing and potentially affect ex-

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23. Despite its prohibitions, the Act does not require an exhibitor actually to attend a trade screening and see the motion picture in advance. It merely requires that all motion pictures offered for licensing in Pennsylvania be trade screened. *See* Section C, *infra,* for discussion of the way the Act goes beyond prohibiting any abuses such as coercion of an exhibitor to accept an unknown product, or deceptive practices or fraud.

pression and its dissemination in copyrighted motion pictures.[24]

Section 8 compounds that risk. Requirements such as that a trade screening be held before bids are invited or negotiations take place, or that, in the event that all bids are rejected, there may be no private post-bidding negotiation, but instead, the picture must be re-bid, create an additional (and undesirable) risk of delay in the licensing of motion pictures that is substantial and not merely "theoretical." *Buckley v. Valeo, supra,* 424 U.S. at 19, 96 S.Ct. at 634. Before the Act was passed, if the bidding process failed to produce a satisfactory result, negotiations between a distributor and an exhibitor were permitted. The Act prohibits this.

Furthermore, the requirement of Section 7, that a motion picture be "made available" after 42 days to subsequent run theatres, opens the door to additional delays if the film is to be "made available" by bidding. The risks of delays in licensing which potentially affect expression that are created by Sections 7 and 8 are obvious from the face of the Act.

Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), is perhaps the Court's definitive statement of the unconstitutionality of the risk of delay in the licensing of motion pictures for exhibition in theatres. There, a statute requiring motion pictures to be submitted to a State Board of Censors for the purpose of sorting out obscene from constitutionally protected films was held unconstitutional. The Court struck down the statute because its burdensome and time-consuming

24. *See Allied Artists Pictures Corp. v. Rhodes,* 496 F.Supp. at 423, 435, where Judge Duncan found as a fact that the Ohio statute posed a risk of some delay in the release of films. He also recognized that because the Ohio statute "prohibits bidding until after trade screening, it necessarily entails that release of a completed motion picture is suspended during the time it takes to complete the bidding procedure." *Id.* at 421.

procedures created both the "risk of delay" and the "danger of unduly suppressing protected expression . . . .", 380 U.S. at 54, 85 S.Ct. at 736 [emphasis added]. The Court (Justice Brennan) observed that "in the case of motion pictures, it may take very little to deter exhibition in a given locality." *Ibid.*[25] Whether factual bases existed for the expectation of delay or suppression was not at issue; the standard of constitutionality was the presence of the risk.[26] *See also Southeastern Promotions Ltd. v. Conrad, supra,* 420 U.S. at 560-62, 95 S.Ct. 1239, 1247-48, 43 L.Ed.2d 448 (risk of discouraging use of a public forum and of delaying unconstitutionally affected First Amendment liberties); *Allied Artists Pictures Corporation v. Rhodes, supra,* 496 F.Supp. at 433 ("a delay of expression is an abridgement of it; where the delay is not justified by a substantial governmental interest it cannot be condoned."); *Goldman Theatres, Inc. v. Dana,* 405 Pa. 83, 173 A.2d 59 (1960), *cert. denied* 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1961).[27]

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25. Justice Brennan, in discussing the risk of delay created by the statute, also noted that "[i]t is common knowledge that films are scheduled well before actual exhibition. . . .," a point made as well by Judge Duncan in Ohio. *See Allied Artists Pictures Corp. v. Rhodes, supra,* 496 F.Supp. at 422.

26. Maryland subsequently enacted a more limited statute that met *Freedman's* requirements and that was upheld by the Supreme Court. *See Star v. Preller,* 375 F.Supp. 1093 (D.Md. 1974), *aff'd without opinion* 419 U.S. 956, 93 S.Ct. 3054, 37 L.Ed.2d 1016 (1974).

27. *See Nebraska Press Association v. Stuart,* 423 U.S. 1327, 1329, 96 S.Ct. 251, 253, 46 L.Ed.2d 237 (1975), in which Justice Blackmun wrote in another context:

> "Each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable."

As to financial uncertainties which might affect expression, defendants themselves assert that the licensing and exhibition of motion pictures involve "significant economic risks" (Fox Affidavit, ¶ 4), and that there exist certain "risks as to the economic viability of the pictures" (Schlanger Affidavit, ¶ 10). *See also Allied Artists Pictures Corp. v. Rhodes, supra,* 496 F.Supp. at 415, observing that the motion picture industry is a "high risk, high profit business." It is clear that the Act, on its face, by prohibiting guarantees, advances, and exclusive first runs limited only by market demand, enhances the financial risks that the distributor of motion pictures must bear. This was recognized in *Allied Artists,* where Judge Duncan observed that even the less stringent Ohio statute "has a potential for increasing the plaintiffs' production and marketing costs . . . .," 496 F.Supp. at 423, that "[a]bolition of guarantees means the production occurs without prompt reimbursement; costs are not recovered, if at all, until after the film is completed . . . ." 496 F.Supp. at 434, and that the Ohio statute prohibited "risk-shifting devices." *Id.* at 423. Furthermore, defendants here have complained that before the Act was passed, exhibitors were forced to bear some risks of lack of commercial success. Schlanger Affidavit, ¶ 11. The implication is that the Act has increased the risk to the producer/distributor.

In Pennsylvania, if a percentage of gross receipts license term is utilized, any guarantee of return is forbidden. This prohibition, on its face, increases the acknowledged risk of the enterprise that must be borne by the makers and distributors of motion pictures. The 42-day provision (Section 7) creates the risk that exhibition of a given motion picture might not take place for a period of time sufficient to make it economically worthwhile. The prohibition against advances prevents a distributor from obtaining security from exhibitors for any reason whatsoever. These limitations on prior practices

plainly have a potential impact, even though indirect, upon the production, distribution and exhibition of motion pictures, recognized as a risky undertaking.

Statutes that create the presence of financial or other risks that might inhibit expression have been held to be unconstitutional as a matter of law. Thus, in *Miami Herald Publishing Co. v. Tornillo, supra,* 418 U.S. 241, 257, 94 S.Ct. 2831, 2839, 41 L.Ed.2d 730 (1974), the Court found impermissible under the First Amendment the risk that newspaper editors, required to provide free space for response to controversial editorials, might feel compelled by the economics of this government-imposed access requirement to stop printing the controversial editorials. In *Buckley v. Valeo,* 424 U.S. 1, 19, 96 S.Ct. 612, 634, 46 L.Ed.2d 659 (1976) the Court observed that financial limitation "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." Most recently, in *Village of Schaumburg, supra,* 444 U.S. at 632, 100 S.Ct. at 833, the Court recognized that "without solicitation [for funds] the flow of such information and advocacy would likely cease." Many years earlier, in *Grosjean v. American Press Co., supra,* 297 U.S. at 245, 56 S.Ct. at 447, the Court held that a state license tax, directed at newspapers and magazines, and imposed on gross receipts upon advertising in well-circulated newspapers, violated the First Amendment because its "tendency is to restrict circulation . . . destroying both advertising and circulation . . . ." And in *Murdock v. Pennsylvania,* 319 U.S. 105, 114, 63 S.Ct. 870, 875, 87 L.Ed.2d 1292 (1943), it held that the costs of a commercial solicitation tax, applied to religious groups, "restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise."

Significantly, most of the above restraints were not directly or explicitly content-related. In all of the cases in

which they were involved, the Court recognized the dangers of such indirect restraints to the ability to express ideas and to their free dissemination — the very risks that the Act's restrictions pose.

On their face, the Act's prohibitions against guarantees, long exclusive first runs, and advances throw the undisputed financial risks of motion picture production, distribution, and exhibition more heavily on the producer/distributor and create the danger of affecting the financial investment processes through which motion pictures and the ideas they express, are created and communicated.[28] The cases demonstrate that extensive factual analysis of the actual burdens that might be imposed by the Act is not necessary; a genuine risk of affecting activities protected by the First Amendment, if not counterbalanced by significant public governmental purposes, served by a precisely tailored enactment, is itself unconstitutional.

C. *When standards for evaluating indirect restraints upon expression are applied to the Act, it is clear that its purposes are not compelling and that its restraints are overbroad.*

In *United States v. O'Brien, supra,* 391 U.S. at 376-77, 88 S.Ct. at 1678-79, the Supreme Court set forth the still-accepted four-pronged test for evaluating the impacting of indirect statutory regulation of expression.

> "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional

28. *Allied Artists Pictures Corp. v. Rhodes, supra,* 496 F.Supp. at 415.

power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[29]

When the standards of analysis that are set forth in *O'Brien* and the subsequent cases that have followed its principles are applied to the Act, it is clear that the Pennsylvania Act's explicit and implicit purposes do not meet its criteria and that the Act's non-waivable and comprehensive prohibitions are not drawn with the narrow precision that the cases require.[30]

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29. *See also First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 786, 98 S.Ct. at 1421. There, a state law prohibited certain businesses, such as banks, from making contributions to publicize their views on political issues, other than on questions that materially affected their property. The Supreme Court viewed this "indirect" restriction as directly limiting the subjects of corporate speech. In striking down the restraint, it forcefully stated the governing requirements:

" '[T]he State may prevail only upon showing a subordinating interest which is compelling' . . . 'and the burden is on the government to show the existence of such an interest. . . .' Even then, the state must employ means 'closely drawn to avoid unnecessary abridgement. . . .' " [citations omitted].

Under *Belotti*, the state, as the proponent of legislation must meet the burden of demonstrating the existence of a compelling interest, and must "closely draw" the legislative means to achieve that purpose while avoiding unnecessary abridgement of free expression.

30. When First Amendment interests are involved, a court may not apply the liberal "rational basis" due process test of *United States v. Carolene Products Co., supra,* 304 U.S. 144, 152, 58 S.Ct. 778, 782, 82 L.Ed. 1234 (1939), and *Nebbia v. New York,* 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934), in which the "laws passed" must only have a "reasonable relation to a proper legislative purpose and [be] neither arbitrary nor discriminatory. . . ." *Id.* at 537, 54 S.Ct. at 516. *Compare Allied Artists Pictures Corp. v.*

With regard to purposes, the legislature's list in Section 2 of the Act (*see* note 12, *supra*) cannot be deemed to contain purposes that are sufficiently "substantial," "significant," or "compelling" public or governmental interests to justify the Act.[31] Asserted purposes 1, 4, 5, and 9 (*see* note 12, *supra*), speak generally of broadening public access to motion pictures, particularly with regard to subsequent "runs," but, like the governmentally-coerced access found constitutionally unacceptable in *Miami Herald Publishing Co. v. Tornillo, supra,* 418 U.S. at 255, 94 S.Ct. at 2838, such objectives create the risk of indirect burdens that inhibit expression, and under the cases, are insufficiently compelling to justify the Act's potential restraints upon expression. Section 2, which speaks of the "access of the public" and "insuring unabridged access" to motion pictures, when read together with the requirement of Section 7, that a

Footnote 30 (Continued)
Rhodes, supra, applying that "rational basis" test to the more limited Ohio enactment and finding that "the Act rationally relates to a number legitimate and important state interests." 496 F.Supp. at 432. A more demanding standard is required when a state's laws "run afoul of some specific constitutional provision or other federal law." *City of New Orleans v. Dukes,* 427 U.S. 297, 304, n.5, 96 S.Ct. 2513, 2517, n.5, 49 L.Ed.2d 511 (1976), on remand 537 F.2d 856 (5th Cir.).

31. Furthermore, a Court must look behind a recitation of purpose, for ". . . the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975). *See also Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1279 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great Western United Corp.,* 443 U.S. 173, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979) (rejecting stated state legislative purposes in a takeover statute as irrelevant); *Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662, 670, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981), holding (in the context of a Commerce Clause challenge to a state statute) that:

> "[T]he incantation of a purpose to promote the public health or safety does not insulate a state law from . . . attack."

film be reoffered after 42 days for exhibition at subsequent run theatres, or of Section 8(e) that, once invitations for bids are issued, a motion picture may not be withdrawn, appears to run afoul of the Supreme Court's opinion in *Miami Herald, supra,* which rejected such requirements.

Asserted purposes 2, 3, 6 and 8 (*see* note 12, *supra*), refer generally to protection of the private business interests of the exhibitors in relation to distributors or to enhancing competition.[32] However, the cases demonstrate that protection of the commercial interests of a private group, here, motion picture exhibitors, is not sufficiently "compelling" to justify intrusion into areas protected by the First Amendment.

Asserted purpose 10 simply speaks of the need to prohibit "blind bidding."

When these purposes are examined in the light of the purposes found insufficient to support regulation in such cases as *Buckley v. Valeo, supra,* invalidating a limitation on campaign expenditures as an indirect restraint on speech, or *Village of Schaumburg, supra,* invalidating the "75% requirement," or the many other cases that could be cited, it is clear that they cannot sustain this Act's restraints. An illustrative case is *Home Box Office v. Federal Communications Comm'n.,* 567 F.2d 9, 49-50 (D.C. Cir. 1977), *cert. denied sub nom. Federal Communications Comm'n. v. Home Box Office,* 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977), *reh. denied* 434 U.S. 988, 98 S.Ct. 621, 54 L.Ed.2d 484 (1977), *later app.* 587 F.2d 1248 (1978). There the Court applied the *O'Brien*

32. As to enhancing competition, or asserted purpose 7, prevention of deception, even if these purposes were legitimate and/or substantial, and not mere "incantations," *see Kassel, supra,* 450 U.S. at 670, 101 S.Ct. at 1316, *Village of Schaumburg, supra,* 444 U.S. at 636, 637, 100 S.Ct. at 836, the cases demonstrate that they must be served by more narrowly drawn means.

criteria and struck down administrative regulations with a strong presumption of validity promulgated by the FCC and with the ostensible valid purpose of avoiding "siphoning." The Court found that, while those regulations, prohibiting all advertising during programs and limiting the number of feature films and sportcasts combined, did not regulate content directly, they violated the First Amendment as indirect restraints. Applying the *O'Brien* standard, it held (*id.* at 49-50):

> "The no-advertising and 90-percent rules clearly violate *O'Brien's* first criterion. Not only do they serve no 'important or substantial . . . interest,' 391 U.S. at 377 . . . they serve no purpose which will withstand scrutiny on this record . . . . Instead, the Commission has indulged in speculation and innuendo. *O'Brien* requires that 'an important or substantial government interest' be demonstrated. . . ." (Footnotes omitted).

The purposes cited by defendants in their briefs (such as correcting the effects of economic disparity) do not advance their argument. Indeed, they weaken defendants' argument by emphasizing the absence of any compelling *public* purposes that serve as a foundation for the Act's broadly conceived restraints.

Defendants have argued that the Act is no different from the laws of general application designed to implement policies such as equal employment, antitrust, zoning, product safety, fraud prevention, or consumer protection and the like, and that its effects are "peripheral" restrictions on expression with which the First Amendment, whose purpose is to protect fundamental freedoms, is not concerned. It is true that cases like *Pittsburgh Press Co. v. Pittsburgh Comm'n. on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973), *reh. denied* 414 U.S. 881, 94 S.Ct. 30, 38 L.Ed.2d 128, where the Court held that the newspaper

industry whose "product" is protected speech must follow the laws governing equal employment, and others cited by defendants that uphold statutes of general application regulating antitrust violations or labor relations, demonstrate that businesses whose product is expression are as subject as are any other enterprises to laws of general application carrying out valid public policies. However, the Pennsylvania Act is not a statute of general application but a comprehensive regulatory enactment directly regulating motion picture licensing and its purposes are not comparable to those in the regulation upheld in *Pittsburgh Press*; nor are the Act's effects "peripheral."[33] The cases on which defendants rely do not support this Act's comprehensive regulation of the means of distribution and exhibition of motion pictures in Pennsylvania—regulation that is addressed solely to one aspect of one business. *See, e.g., Metromedia, Inc. v. City of San Diego, supra,* ____ U.S. at ____, 101 S.Ct. at 2896.

Nor is the Act like a consumer protection statute. Despite the general language in Section 2, the Act limits transactions between business entities, not between the

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33. Thus, this case is very different from those cited by defendants. *Compare Lorain Journal Company v. United States,* 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951) (newspapers are subject to the antitrust laws); *Oklahoma Press Publishing v. Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946) (the Fair Labor Standards Act applies to newspapers); *United States v. Hunter,* 459 F.2d 205 (4th Cir.), *cert. denied sub nom. Hunter v. United States,* 409 U.S. 934, 93 S.Ct. 235, 34 L.Ed.2d 189 (1972), *reh. denied* 413 U.S. 923, 93 S.Ct. 3046, 37 L.Ed.2d 1045 (1973) (prohibition against publication of discriminatory housing advertisements in newspapers is not a First Amendment violation). Each of these cases involved significant federal policies exemplified in federal enactments of general application as applied to industries otherwise protected by the First Amendment, in contrast to this case. Nor is this case like *United States v. Paramount Pictures Corp.,* 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948) in which the court applied the federal antitrust laws to the motion picture industry.

ultimate consumer and an entity engaged in deceptive practices. *Compare Donaldson v. Reed Magazine, Inc.*, 333 U.S. 178, 68 S.Ct. 591, 92 L.Ed. 628 (1948) (postmaster-general determined that a contest was fraudulent and refused to allow use of the mails for circulation of books and magazines offering prizes); *Savage v. Commodity Futures Trading Comm'n.* 548 F.2d 192 (7th Cir. 1977) (regulation of fraud in commodity trading).

The purposes of Section 2, and those which defendants propose, might well be valid and support another, more limited regulation, possibly one more closely resembling the Ohio statute. Judge Duncan's observation, that "delay is a direct result of trade screening, the importance of which to the state's regulatory purposes has been earlier emphasized. . . .," 496 F.Supp. at 435, is applicable to a statute, that, unlike Pennsylvania's, does not prohibit all guarantees and advances, and that does not require that films be "made available" after 42 days to subsequent run theatres, but which, instead, primarily eliminates blind bidding. *This* comprehensive regulation sweeps too broadly and requires more substantial purposes to justify it.

Even if the purposes asserted in Section 2 of the Act were sufficiently "substantial" or "compelling" to justify *some* regulation, the Act is not the precisely drawn enactment that the Court requires. In *Village of Schaumburg v. Citizens For A Better Environment*, *supra*, 444 U.S. at 636-637, 100 S.Ct. at 836, the Supreme Court held that the village's "75% requirement" could not be sustained unless (1) it served a sufficiently strong interest that the village was entitled to protect and (2) did not unnecessarily (and overbroadly) restrict expression. The village alleged that prevention of fraud was its principal justification (like asserted purpose 7 here, 73 P.S. § 203-2(7)). The Court (Justice White) not only

found no substantial relationship between the 75% requirement and any valid goals of fraud prevention, public safety, or residential privacy; it wrote:

> "The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."

Id. at 637, 100 S.Ct. at 836.

See also Schad v. Borough of Mt. Ephraim, supra, ____ U.S. at ____, 101 S.Ct. at 2184-87, where the Supreme Court reversed convictions for violating that portion of a village zoning ordinance that barred "live entertainment" from the uses permitted in the borough's commercial zones. The borough argued that the purposes of the prohibition were to serve the immediate needs of borough residents and to avoid parking and police problems—normally, valid zoning goals. *Id.* at ____ - ____, 101 S.Ct. at 2184-87. The Court found that the ordinance's purposes were not sufficiently substantial to justify the overly restrictive means used:

> "[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. . . . Similarly, in *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980), it was emphasized that the Court must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment. . . ." *Id.* at ____ - ____, 101 S.Ct. at 2182-2184.

If a zoning ordinance that would traditionally survive judicial scrutiny, *see Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), must

meet such strict criteria, logically, regulation of bargaining relationships in motion picture licensing, a far less compelling or public state activity, must meet them—even when that regulation is "content-neutral" is contrast to an ordinance prohibiting live entertainment. *Accord: Schneider v. State,* 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939) (invalidating restrictions on door-to-door and street distribution of circulars when government's purpose could be achieved less restrictively); *Space Age Products, Inc. v. Gilliam,* 488 F.Supp. 775 (D.Del.1980) (even so valid an objective as elimination of fraud did not justify an overbroad "prior restraint" on plaintiff's First Amendment rights, although the "speech" in question, unlike motion pictures, was mere advertising for a "pyramid" scheme).

The Act's provisions strike too broadly and affect protected rights more substantially than the cases permit. Several examples of its overbreadth are apparent on its face. For example, assuming *arguendo* that asserted purpose 7 (prevention of "deceptive practices") were deemed both to be "substantial" and a purpose intended by the legislature, a more specific bill mandating advance disclosure or permitting cancellation of a license agreement after screening, or even simply requiring an advance trade screening, would address that issue more directly and with less impact upon protected rights. However, the Act couples prohibitions against guarantees and advances with those against blind bidding, although the affidavits of defendants Budco and Fox argued forcefully that guarantees were undesirable primarily because, if a film were not trade-screened, an exhibitor would not have seen a film before entering into a license agreement in which he guaranteed a return to the distributor.[34] According to defendants' own rationale,

34. Fox Affidavit at ¶¶ 4, 5, 7. Thus, Fox speaks of the evils of "the combination of guarantees and not being able to see a film before bidding on or negotiating for it. . . ." ¶ 5.

the Act is overbroad on its face (and violates the *O'Brien* criteria) when it prevents an exhibitor from offering a guarantee (or an advance) to compete to obtain a picture once advance trade screenings have been required.

Defendants also argue that the Act's restrictions are mere "time," "place," and "manner" regulation, *see Grayned v. City of Rockford*, 408 U.S. 104, 116-117, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972) and rely on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), *reh. denied* 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976), for the proposition that mere indirect regulation of the time and place of speech offends no constitutional provision. In their view, requiring advance trade screenings, mandatory rebidding, and reoffers of films after 42 days are reasonable regulations that leave open sufficient alternative channels for communication to avoid unconstitutional restriction. *Young*, however, is not dispositive of this case, nor has it been accorded much weight in subsequent Supreme Court decisions (*see, e. g., Schad v. Borough of Mt. Ephraim, supra*, ____ U.S. at ____, 101 S.Ct. at 2184).

First, in contrast to the instant case, which involves the direct regulation of all aspects of the motion picture licensing process, *Young* only restricted the location of certain specific theatres showing sexually explicit "adult" films. Thus, it regulated one narrow aspect of motion picture exhibition that is not involved in this case. By contrast to the regulation in *Young*, the instant Act directly regulates the entire process of licensing of motion pictures for exhibition in theatres in Pennsylvania (and is not concerned with such peripheral First Amendment matters as obscenity).

Second, in upholding the ordinance in *Young* (by a 5-4 vote), the Court emphasized the existence of evidence presented to the lawmakers of neighborhood deterioration due to concentration of the regulated theatres. 427 U.S. at 62, 96 S.Ct. at 2448. There have been no comparable findings here.

Finally, in *Young*, the challenged ordinance merely dispersed the theatres being regulated and had no impact upon the availability of the sexually explicit films. *See* 427 U.S. at 71, n.35, 96 S.Ct. at 2453, n.35. It is questionable whether such provisions as the Act's time limitation on exclusive first runs is comparable to that "dispersal;" it creates the risk of potential economic impact and limiting availability of all types of films.

In *Schad v. Borough of Mt. Ephraim, supra*, the borough, relying on *Young*, argued that its zoning ban on live entertainment was mere "time," "place," and "manner" regulation. It claimed, *inter alia*, that because live entertainment was amply available outside the borough, opportunities for this form of expression had not been restricted (this is comparable to an argument that Section 7, which sets a time limit on exclusive first runs, is constitutional "time," "place," and "manner" regulation because the films will be available in locations other than prime theatres). The Supreme Court rejected that view and, quoting from *Schneider v. State*, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939) observed that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* ____ U.S. at ____, 101 S.Ct. at 2188.

The Act's provisions directly regulate and affect the licensing process which permits dissemination of expression contained in motion pictures to theatre audiences in Pennsylvania. The Act is not the narrowly drawn regulation that the cases require when First

Amendment rights are affected. The Act is not a law of general application. The risks to expression that it creates, although indirect, are apparent on its face. In the absence of compelling governmental interests, directly and precisely served by legislation with a substantial relationship to them, *Village of Schaumburg, supra*, 444 U.S. at 639, 100 S.Ct. 837, its indirect restraints on expression cannot stand, even though they are not phrased as direct regulation of content.

IV. THE ACT'S INTERFERENCE WITH FEDERAL COPYRIGHT LAW.

The foregoing analysis is, of course, dispositive of this motion. However, because of the importance of this constitutional challenge to a significant state legislative enactment, in which it is claimed that the state enactment interferes with federal law, this opinion will also discuss plaintiffs' Supremacy Clause claim.

Initially, it is important to observe that the case law provides little guidance with regard to the constitutionality of such comprehensive regulation of copyright licensing by a state.[35] However, such analogies as exist in

35. This Court has carefully examined the cases cited in the parties' briefs and has independently sought for additional authority in this area. There is very little direct case authority on the issue before the court. Those cases in which state action in the copyright area has been stricken deal primarily with conflicting grants of copyright. *See e. g., Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979). *Compare Remick Music Corp. v. Interstate Hotel Co.*, 58 F.Supp. 523 (D.Neb.1944), *aff'd sub nom. Interstate Hotel Co. v. Remick Music Corp.*, 157 F.2d 744 (8th Cir. 1946), *cert. denied* 329 U.S. 809, 67 S.Ct. 622, 91 L.Ed. 691 (1947), *reh. denied* 330 U.S. 854, 67 S.Ct. 770, 91 L.Ed. 1296 (1947), holding that a state law was unconstitutional because it required a copyright holder to offer his property for sale in a certain way and limited his right to fix the terms and the price of a license. *Id.* 58 F.Supp. at 543-4. In *Remick*, failure to comply with the state law resulted in virtual forfeiture of the copyright.

the cases and analysis and comparison of the two statutory schemes convince this Court that a conflict impermissible under the Supremacy Clause exists between the Act and federal copyright law.

The issue of whether the Pennsylvania Act must be deemed preempted under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, raises "sensitive issues of state/federal relations. . . .," *Allied Artists Pictures Corp. v. Rhodes, supra,* 496 F.Supp. at 442, and this Court has approached that determination with caution. The often-stated and well-established criteria that govern preemption were summarized in *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26, 97 S.Ct. 1305, 1309-10, 51 L.Ed.2d 604 (1977), *reh. denied* 431 U.S. 925, 97 S.Ct. 2201, 53 L.Ed.2d 240:

> "The first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S. Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. Where . . . the field which Congress is said to have preempted has been traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' . . . But when Congress has 'unmistakably . . . ordained', that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Footnote 35 (Continued)

The cases cited by defendants for the proposition that there is no conflict between the state and federal schemes are inapposite in that they deal with application of the antitrust laws or other laws of general application to copyrighted property or to trademarks or with taxes of general application.

> "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S.Const., Art. VI. The criterion for determining whether state and federal law are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " [citations omitted]

See also Maryland v. Louisiana, ____ U.S. ____, ____, 101 S.Ct. 2114, 2128, 69 L.Ed.2d ____ (1981); *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

The history, purposes and provisions of the 1976 Copyright Act demonstrate that, in this area, Congress has "unmistakably ordained" that federal enactments are to govern.[36] *See* the Notes of the Committee on the

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36. *See Morseburg v. Balyon*, 621 F.2d 972 (9th Cir.) *cert. denied*, 449 U.S. 983, 101 S.Ct. 399, 66 L.Ed.2d 245 (1980) in which this principle — that whether a particular conflict between state and federal laws will be found tolerable or unconstitutional normally depends upon the relative strength and nature of the federal and state interests involved — recently was discussed. The Court of Appeals rejected the argument that a state transfer tax on royalties should be preempted under the former Copyright Act. The Court observed that when the "area of occupation" is peculiarly federal, or nationwide in its concern, the Supreme Court has emphasized the national interest and has found preemption:

"[C]ertain basic doctrinal notions repeatedly are used in applying preemption. Thus, the extent to which the federal law has 'occupied the field' and the presence of 'conflict' between the federal and state law have always been focuses of analytic attention. The nature of the Court's emphasis at a particular time is revealed by whether 'occupation of the field' and 'conflict' are easily found to exist or not. 'Occupation' can require no more than the existence of a federal law generally applicable to a significant portion of the area in question to no less than an express statement demonstrating an

Judiciary, House Report No. 94-1476, 94th Cong., 2d Session, 1976, reprinted at pp. 271-72 of 17 U.S.C.A. (1977), U.S. Code Cong. & Admin.News 1976, 5659. To make these intentions enforceable, Congress enacted an explicit statutory preemption section in the 1976 Copyright Act, Section 301(a), 17 U.S.C. § 301(a). That section provides, in pertinent part, that:

> "(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state."

Section 301(b) establishes certain exemptions. Significantly, Congress broadened the scope of Section 301(a) from an earlier version (H.R. 4347, 89th Congress, 2d Sess. (1966)) which had provided only that "all rights in the nature of copyright" were preempted and, at the same time, eliminated from the same earlier version of Section 301(b) specific examples of exemptions to the

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Footnote 36 (Continued)
intention to occupy the field duly enacted by Congress. 'Conflict' likewise, can require no more than a mechanical demonstration of potential conflict between federal and state law to no less than a showing of substantial frustration of an important purpose of the federal law by the challenged state law." 621 F.2d at 976.

Recently, in *McCarty v. McCarty*, ____ U.S. ____, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the Court held that even in the area of domestic relations, which "belongs to the laws of the States and not to the laws of the United States. . . .," *In re Burrus*, 136 U.S. 586, 593-94, 10 S.Ct. 850, 852-53, 34 L.Ed. 500 (1890), a state's community property laws must give way to federal law as enacted in military retirement statutes.

preemption provision, such as breaches of contract or deceptive practices. *See generally* discussion in *Nimmer on Copyright*, ¶ 1.01(b) at pp. 1-10 through 1-19 (1978).

As defendants correctly point out, the Act does not make recompense to the copyright holder impossible, nor does it establish a conflicting system of state copyright which would obviously be preempted under Section 301. However, as Judge Duncan stated in *Allied Artists*, the standard is whether state legislation "grants, creates, or *destroys*" rights equivalent to those of a copyright. *Allied Artists Pictures Corp. v. Rhodes, supra*, 496 F.Supp. at 443 (emphasis added), and, in certain ways, the Act has that effect. *See* discussion at pp. 993-995, *infra*. *Compare Remick Music Corp. v. Interstate Hotel Co., supra*, 58 F.Supp. at 543-4.

However, the Court need not find statutory preemption; the more general question of conflict of the two statutory schemes under the Supremacy Clause is decisive. Plaintiffs contend that the Act limits the exercise of federally created rights and, therefore "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra*, 312 U.S. at 67, 61 S.Ct. at 404. Analysis of the purposes and objectives of the Copyright Act and the Pennsylvania Act's impact upon them convinces me that plaintiff's arguments have merit.

To ascertain those purposes, it is necessary, first, to look at the constitutional provision governing copyrights and second, at the Copyright Act itself. Article 1, Section 8, Cl. 8 provides that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing, for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This provision makes clear that the public goal—promoting "Science and useful Arts"—is to be

served by the means of rewarding the "Author." Furthermore, the legislative history of both the 1976 Copyright Act and its predecessor, as well as the relevant cases decided under both federal Acts, demonstrate that, while the public interest in the dissemination of copyrighted material is, of course, paramount, *Fox Film Corp. v. Doyal,* 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010 (1932), Congress believed that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors. . . ." *Mazer v. Stein,* 347 U.S. 201, 74 S.Ct. 460, 98 L.Ed. 630 (1954), *reh. denied,* 347 U.S. 949, 74 S.Ct. 637, 98 L.Ed. 1096 (1954). Thus, in *Goldstein v. California,* 412 U.S. 546, 555, 93 S.Ct. 2303, 2309, 37 L.Ed.2d 163 (1973), *reh. denied* 414 U.S. 883, 94 S.Ct. 27, 38 L.Ed.2d 131 (1973), interpreting the former Copyright Act, the Court explained that "to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of *control over the sale or commercial use* of copies of their works" [emphasis added].

Section 106 of the 1976 Copyright Act, 17 U.S.C. § 106, protects the right of the copyright holder to profit from its creative efforts and governs the way in which a copyright holder may distribute its work to the public and realize the economic benefits of that work. It provides that a holder of a copyright has, among others, the "exclusive rights to do and to authorize any of the following:"

* * * * * *

> "(3) to distribute copies or phono-records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

> "(4) in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly. . . ."

The legislative history of Section 106 indicates the importance accorded by the draftsmen of the Copyright Act to the right of the copyright holder to "distribute [his works] . . . by rental, lease, or lending. . . ." The notes of the Committee on the Judiciary, House Report No. 94-1476, show that "[t]he five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106. These exclusive rights, which comprise the so-called 'bundle of rights' that is a copyright, are cumulative and may overlap in some cases [emphasis added]." 17 U.S.C.A. at 100. Clearly, the Committee viewed the right to license as an essential element of the copyright itself. State regulation that interferes with that right interferes with the essence of the copyright grant and with the achievement of the Congressional objectives.

Furthermore, the same Committee notes make clear the Congressional intent that "the copyright owner would have the right to control the first public distribution of an authorized copy of his work *whether by sale, gift, loan, or some rental or lease arrangement. . . .* [emphasis added]," *id.* at 101, the choice clearly being the copyright holder's.

Although the Pennsylvania Act does not prohibit the grant of a copyright under federal law or establish a competing copyright system or equivalent right under state law, its provisions substantially restrict the conditions under which a copyright holder may distribute and license its work. Its regulation of the conditions under which "rental, lease, or lending" may take place interferes with the federally created rights granted by § 106

and with the copyright holder's "control over the sale or the commercial use. . . ." of its work, *Goldstein, supra,* 412 U.S. at 555, 93 S.Ct. at 2309, in ways that the Ohio statute upheld in *Allied Artists* does not.

For example, Section 6 of the Pennsylvania Act makes unlawful the inclusion of any advances in licenses. By contrast, an exhibitor who wishes to do so may offer an "advance" in Ohio, where a short (14 day) advance is permitted in a license agreement. Thus, while the Ohio statute upheld in Judge Duncan's opinion in *Allied Artists* may not have unconstitutionally limited a copyright holder's control over the commercial use of its work, the Pennsylvania Act goes further.

A second example is the Pennsylvania Act's absolute prohibition of all guarantees in combination with percentage payments. In *Allied Artists,* Judge Duncan recognized that the Ohio statute merely prohibited the conditioning of a license agreement upon a demand of a guarantee when a percentage rental was sought, unlike Pennsylvania's Act, which prohibits all guarantees outright, and implied that otherwise, he might have come to a contrary decision about the Ohio statute's constitutionality:

> "First, plaintiffs assert that the Ohio Act's prohibition of licenses conditioned on guarantees conflicts with the right afforded by copyright owner 'to distribute copies . . . by rental, lease, or lending.' Plaintiffs contend that as a result of this prohibition, the owner of a copyright in a motion picture is faced with the mutually exclusive choices of licensing his film for a fixed price (guarantee) and licensing his film only for a participation in its profits (film rental). Plaintiffs contend that the Ohio Act operates to deny to an artist one of the most basic rights inhering in private property—the right to sell or lease the property for a fixed price reflecting its value to the lessee.

> "As a factual matter, the Act does not present the plaintiffs with the Hobson's Choice indicated. By its terms, it does *not* prohibit guarantees; *it merely prohibits conditioning the granting of a license agreement on the payment of a guarantee when a film rental is also sought. The Act merely limits the circumstances under which guarantees may be obtained to situations in which the licensor does not compel the licensee to promise a guarantee as a condition to receiving the license.* Yet in so doing, the Act does restrict the formerly unfettered discretion in producer-distributors to demand payment by guarantees." [Emphasis added]

496 F.Supp. at 445.

In Pennsylvania, the Act poses exactly this "Hobson's Choice."

A third example of interference with § 106 is Section 7 of the Act, which regulates the term of the license—a provision which is not included in the Ohio statute at all. After 42 days, the film must be reoffered for licensing, and the run must be "expanded." The copyright holder's freedom to license or not to license is directly affected by this section of the Act.

The bidding requirements (also present in Ohio) restrict the licensor's control and freedom to license even further. Once bids are sought, a motion picture license may not thereafter be negotiated privately. Section 8 also requires that bidders be informed of the terms of competitors' bids. Since negotiation may not take place if all bids are rejected, return to the copyright holder is necessarily affected, for on rebidding, competing exhibitors know the terms that were previously rejected. Furthermore, Section 8 prohibits the licensor from withdrawing the film from the market once bidding is initiated and all bids are rejected, further restricting his freedom not to license under the Copyright Act.

In addition, the requirement of Section 4, that an advance screening be held, requires the copyright holder to delay licensing to a time subsequent to the time at which he is permitted to license under the Copyright Act. This requirement, also present in Ohio, conflicts with § 106. *See Kennecott Corp. v. Smith*, 637 F.2d 181, 188 (3d Cir. 1980) (New Jersey Takeover Bid Disclosure Law, delaying "commencement" of a tender offer, conflicted with 5-day waiting period in SEC Rule 14(d)-2, 17 C.F.R. § 240.14(d)2(b) (1980); *Crane Co. v. Lam*, 509 F.Supp. 782, CCH Fed.Sec.L.Rep., ¶ 97,896 (E.D.Pa. 1980) (Pennsylvania Takeover Disclosure Act imposed a time period that conflicted with that in the Williams Act).

These conflicts with the constitutional goals and Congressional intent as it appears in the history of the 1976 Copyright Act are apparent on the face of the Pennsylvania Act. Given the importance of the exclusive right to license, of the right of control and choice of the means of distribution, and the significance of return to the copyright holder, the conclusion that the Act's restrictions "stand as an obstacle" to accomplishment of the Congressional objectives is compelled.

Defendants cite *Fox Film Corp. v. Doyal*, 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010 (1932) for the proposition that reduction of licensing revenues is not unconstitutional in and of itself, and, of course, that general proposition is correct in the abstract. *See also United States v. Paramount Pictures Corp., supra*, 334 U.S. at 158, 68 S.Ct. at 929; *Allied Artists, supra*, 496 F.Supp. at 446-47. But *Fox Film* only holds that a non-discriminatory state gross receipts tax of general application (which this Act is not) may be applied to revenues received from copyright licensing. Its circumstances are not analogous to the Act's direct regulation of licensing terms and its interference with the licensor's control of the commercial use of its work.

Defendants also rely on cases in which state laws of general application regulating conduct found to be against public policy, only peripherally related to copyright licensing or to trademarks, were upheld. *See Watson v. Buck*, 313 U.S. 387, 404, 61 S.Ct. 962, 968, 85 L.Ed. 1416 (1941) (regulating restraint of trade); *Mariniello v. Shell Oil Co.*, 511 F.2d 853 (3d Cir. 1975) (regulating franchise terminations). However, by contrast to the statutes in those cases, the Act directly and exclusively regulates the process of licensing copyrighted property and directly restricts licensing terms in the agreements themselves, such as guarantees, advances, or the period of the license, rather than condemning behavior that contravenes public policy.

The Act's limit upon the duration of the license, upon when a distributor may license, its prohibition of guarantees and advances, and its bar against licensing or negotiations prior to screening, as well as against consummating a license without complying with rebidding requirements, all directly—and severely—restrict the rights of the licensor. If the question before this Court were merely whether "the mere existence of the [Copyright Act] [prohibits] all lawmaking relating to [copyright]. . . ." *Mariniello*, 511 F.2d at 857, another answer would be required. Here, however, the issue is whether the Pennsylvania Act's broad and comprehensive regulation of the process of licensing copyrighted motion pictures conflicts with the objectives of Congress in its enactment of the Copyright Act. For the reasons stated above, I find that the Act conflicts with Congress' grant of rights under the Copyright Act and ". . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . .," *Jones v. Rath Packing Co., supra*, 430 U.S. at 526, 97 S.Ct. at 1310.

V.

THE COMMERCE CLAUSE, DUE PROCESS AND STATE LAW CLAIMS

Because the foregoing analysis is dispositive of plaintiffs' motion, this Court need not decide the remaining constitutional arguments.

CONCLUSION.

For these reasons, plaintiffs' motion for summary judgment will be granted. An appropriate order will be entered.

This entry of judgment also disposes of plaintiffs' appeal from the Magistrate's Order of September 22, 1980 in plaintiffs' favor. Plaintiffs' motions concerning the counterclaim of Budco Quality Theatres, Inc. will be ruled upon in due course.

COURT OF APPEALS OPINION OF JULY 20, 1982

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 81-2706 to 81-2708

ASSOCIATED FILM DISTRIBUTION CORPORATION,
AVCO EMBASSY PICTURES CORP.,
BUENA VISTA DISTRIBUTION CO., INC.,
COLUMBIA PICTURES INDUSTRIES, INC.,
FILMWAYS PICTURES, INC.,
METRO GOLDWYN-MAYER, INC.,
PARAMOUNT PICTURES CORPORATION,
TWENTIETH CENTURY-FOX FILM CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL PICTURES DIVISION OF
UNIVERSAL CITY STUDIOS, INC.,
UNIVERSAL FILM EXCHANGES,
WARNER BROS., INC., AND WARNER
BROS. DISTRIBUTING CORPORATION,
Appellees

v.

THE HONORABLE DICK THORNBURGH,
Governor of the Commonwealth of Pennsylvania,
Individually and in his official capacity,
HARVEY BARTLE, III, Attorney General for the
Commonwealth of Pennsylvania, individually and
in his official capacity,
BUDCO THEATRES, INC.,
BUDCO QUALITY THEATRES, INC.,
its subsidiary corporation, and
FOX THEATRES MANAGEMENT CORPORATION,

THE GOVERNOR AND THE ATTORNEY GENERAL
OF THE COMMONWEALTH OF PENNSYLVANIA,
Appellants in No. 81-2706.

Appeal of BUDCO QUALITY THEATRES, INC.,
in No. 81-2707.

Appeal of FOX THEATRES MANAGEMENT
CORPORATION, in No. 81-2708.

Argued May 14, 1982.
Before: GIBBONS, and HUNTER, *Circuit Judges*,
and GERRY,* *District Judge*.
(Opinion filed July 20, 1982)

OPINION OF THE COURT

JAMES HUNTER, III, *Circuit Judge*.

Plaintiff in this case are movie distributors and producers. They filed suit against Pennsylvania's governor and several movie exhibitors seeking a declaratory judgment that the Pennsylvania Feature Motion Picture Fair Business Practices Law, 73 P.S. §§ 203-1 through 203-11, was unconstitutional. The trial court granted summary judgment for plaintiffs, striking down the entire statute as violative of the First and Fourteenth Amendments and the preemption provision of the Copyright Act, 17 U.S.C. § 301, 520 F.Supp. 971.[1] For the reasons which follow, we will reverse the grant of summary judgment and remand this case to the district court.

Background

In 1980 Pennsylvania enacted the Feature Motion Picture Fair Business Practices Law ("Pennsylvania Act").[2] The Act forbids all blind bidding, some guaran-

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* Honorable John F. Gerry, United States District Court for the District of New Jersey, sitting by designation.

1. The trial court entered a final judgment under Federal Rule of Civil Procedure 54(b) on the constitutionality of the statute, leaving all other issues, including Budco's antitrust counterclaims, unresolved.

2. The Pennsylvania Act includes the following provisions:

§ 203-2. Legislative findings and purposes

The General Assembly of the Commonwealth of Pennsylvania finds and declares that the licensing and distribution of

Footnote 2 (Continued)

feature motion pictures to theatres in this Commonwealth, including the rights and obligations of distributors and exhibitors, vitally affects the general economy as well as the access of the public to works of artistic expression and opinion. In order to promote the public interest and public welfare of this Commonwealth to:

(1) insure unabridged access for the public to artistic expression and opinion in feature motion pictures at reasonable prices and at many different locations;

(2) avoid undue control of the exhibitors by the distributors;

(3) foster vigorous and healthy competition in offering feature motion pictures for the benefit of the public by prohibiting practices through which fair and honest competition is restrained, destroyed or inhibited;

(4) promote the wide geographical dissemination at reasonable prices to the public of ideas, opinions and artistic expression in feature motion pictures;

(5) prevent delay in the exhibition of feature motion pictures to the public in theatres playing subsequent to the first run showing;

(6) prevent theatres from unnecessarily going out of business, thereby resulting in reducing the number of small independent businesses and unemployment with loss of tax revenues and other undesirable consequences;

(7) prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of distribution and exhibition of feature motion pictures within the Commonwealth;

(8) promote fair and effective competition in that business;

(9) benefit the movie going public by limiting the long and extensive first runs so that additional theatres, in a given area, may also exhibit the same feature motion picture and at possibly a lower admission price; and

(10) prohibit blind bidding by insuring that exhibitors have the opportunity to view a motion picture and know its contents before committing themselves to exhibit it in their communities; it is necessary to legislate regulations and standards pursuant to the exercise of the police power of this Commonwealth governing the relationship between feature motion picture distributors or licensors and exhibitors serving the public by establishing fair business practice procedures for the licensing and distribution of feature motion pictures within the Commonwealth and to provide remedies for the violation of this act, including damages and attorneys' fees.

Footnote 2 (Continued)

§ 203-3. Definitions

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Bid." A written or oral proposal by an exhibitor to a distributor, which proposal is in response to an invitation to bid or negotiate and states the terms under which the exhibitor will agree to exhibit a feature motion picture.

"Blind bidding." Bidding, negotiating, offering terms, accepting a bid or agreeing to terms for the purpose of entering into a license agreement prior to a trade screening of the feature motion picture that is the subject to the agreement.

"Distributor." Any person engaged in the business of renting, selling or licensing feature motion pictures to exhibitors.

"Exhibit or exhibition." Showing feature motion pictures to the public for a charge.

"Exhibitor." Any person engaged in the business of operating one or more theatres in this Commonwealth.

"Invitation to bid." A written or oral solicitation or invitation by a distributor to one or more exhibitors to bid or negotiate for the right to exhibit a feature motion picture.

"License agreement." Any contract, agreement, understanding or condition between a distributor and an exhibitor for the exhibition of a feature motion picture by the exhibitor.

"Person." One or more individuals, partnerships, associations, societies, trusts or corporations.

"Run." The continuous exhibition of a feature motion picture in a defined geographical area for a specified period of time. A "first run" is the first exhibition of a feature motion picture in the designated area; a "second run" is the second exhibition and "subsequent runs" are subsequent exhibitions after the second run. "Exclusive run" is any run limited to a single theatre in a defined geographical area and a "nonexclusive" or "multiple run" is any run in more than one theatre in a defined geographical area.

"Theatre." Any establishment in which feature motion pictures are exhibited regularly to the public for a charge.

"Trade screening." The showing of a feature motion picture by a distributor in recognized exchange cities within the Commonwealth which is open to any exhibitor.

§ 203-4. Blind Bidding

Blind bidding is hereby prohibited within the Commonwealth. No negotiations between exhibitors and distributors for the licensing or exhibition of a feature motion picture shall take

Footnote 2 (Continued)

place and no license agreement or any of its terms shall be agreed to for the exhibition of any feature motion picture within the Commonwealth before the feature motion picture has been trade screened within the Commonwealth.

§ 203-5. Guarantees

(a) **Minimum payment to distributor.** — It shall be unlawful for any license agreement which provides for a fee or other payment to the distributor based in whole or in part on the attendance or the box office receipts at a theatre within the Commonwealth to contain or be conditioned upon a guarantee of a minimum payment to the distributor.

(b) **Prohibited guarantees void.**—Any provision, agreement or understanding which provides for such a guarantee shall be void and purported waiver of the prohibition in subsection (a) shall be void and unenforceable.

§ 203-6. Advances

(a) **Advances prohibited.**—It shall be unlawful for any license agreement for the exhibition of a feature motion picture at a theatre within the Commonwealth to contain or be conditioned upon a provision, agreement or understanding that the exhibitor shall advance any funds prior to the exhibition of the picture as security for the performance of the license agreement or to be applied to payments under such an agreement.

(b) **Prohibited advances void.**—Any provision, agreement or understanding which provides for such an advance shall be void and any purported waiver of the prohibition in subsection (a) shall be void and unenforceable.

§ 203-7. Length of run

No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.

§ 203-8. Bidding procedures

(a) **Invitation to bid contents.**—If bids are solicited from exhibitors for the licensing of a feature motion picture within the Commonwealth, then the invitation to bid shall specify the following:

(1) Whether the run for which the bid is being solicited is a first, second or subsequent run; whether the run is an exclusive or non-exclusive run; and the geographical area for the run.

tees, all advances, all "five o'clock looks,"[3] and exclusive first runs which last longer than 42 days. Motion pictures contain protected speech. However, the Pennsylvania Act does not directly affect speech or content; ulate motion pictures as commodities.

Footnote 2 (Continued)

(2) The names of all exhibitors who are being solicited.

(3) The date and hour the invitation to bid expires.

(4) The time, date, name and address of the location where the bids will be opened, which location shall be in the exchange centers of this Commonwealth.

(b) **Trading screening.**—If the motion picture that is the subject of a bid has not already been trade screened within the exchange centers in this Commonwealth, the distributor soliciting the bid shall include in the invitation to bid, the date, time and location of the trade screening for such picture.

(c) **Bid submission and opening.**—All bids shall be submitted in writing and shall be opened at the same time and in the presence of those exhibitors, or their agents, who submitted bids and are present at such time.

(d) **Examination of bids.**—Any exhibitor, or the agent of an exhibitor, who submits a bid for a particular run of a feature motion picture may, at reasonable times within 60 days after a bid is opened, examine any bid that is made for the same run of the motion picture by another exhibitor. The exhibitor may examine the bids even if the distributor rejects all bids that are submitted. Within seven business days after a bid for a particular run of a feature motion picture is accepted, the distributor shall notify in writing each exhibitor who submitted a bid for that run, the terms of the accepted bid and the identity of the successful bidder.

(e) **Rejection of all bids.**—If a distributor issues invitations to bid for a feature motion picture and rejects all bids received, he shall not enter into a license agreement for the exhibition of the picture except by means of the bidding process specified in this section. If the distributor rejects all bids submitted pursuant to the invitation to bid, he shall notify all exhibitors who submitted bids that he rejected all bids and shall issue a new invitation to bid.

3. A "five o'clock look" occurs when a distributor allows a favored exhibitor to see other bids, so that the exhibitor may re-bid. 496 F.Supp. at 430.

Ohio has enacted a similar statutory scheme, R.C. §§ 1333.05 through .07, the constitutionality of which was rather, the Act is an economic statute designed to regupheld after eight weeks of discovery and a four week trial. *Allied Artists Pictures Corp. v. Rhodes*, 496 F.Supp. 408 (S.D.Ohio, 1980), *aff'd in relevant part and remanded on commerce clause issue*, 679 F.2d 656 (6th Cir. June 4, 1982).[4] The Ohio statutory scheme, unlike the Pennsylvania scheme, allows advances within fourteen days of the first exhibition of a movie, forbids *conditioning* a license on guarantees, and contains no provision regulating the length of first runs.[5]

Discussion

The First and Fourteenth Amendments

The trial court ruled that the Pennsylvania Act was unconstitutional as violative of the First and Fourteenth Amendment because the Act, *on its face*, "creates the risk of a delay in licensing and of shifting financial burdens and uncertainties [from the exhibitors to the distributors]." 520 F.Supp. at 983.[6] We disagree. On its face, the Act does nothing but forbid certain trade practices. Whether the Act *in fact* creates any material risk of delay in exhibition or *in fact* threatens to inhibit the production of motion pictures by changing the financial structure of the industry was a hotly contested question

4. The Ohio statute is quoted in 496 F.Supp. at 419-420. Several other states have similar statutes. It appears that Pennsylvania's is the only such statute which has not survived constitutional challenge. *See Allied Artists*, 679 F.2d at 659 n. 2.

5. If the assertion of the exhibitor defendants that advances are often required "against license fees to become due far in the future," appendix at 333, is true, then the fact that the Ohio statute allows advances two weeks before the first showing would not be a material difference between the two statutory schemes.

6. The trial court reached only the First Amendment and Copyright Act issues.

of fact: defendants argued that, in fact, the statute has no impact on any First Amendment freedoms at all, or, in the alternative, that any impact is minimal and more than justified by the need to restore some economic power balance between the exhibitors and the distributors/producers.[7]

The Ohio district court established the following framework for its First Amendment analysis of the Ohio statute:

> There is no question that motion pictures are a form of expression falling within First Amendment protection. *Interstate Circuit v. Dallas*, 390 U.S. 676, 682, 88 S.Ct. 1298, 1302, 20 L.Ed.2d 225 (1968); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166, 68 S.Ct. 915, 933, 92 L.Ed. 1260 (1948). Even assuming that the Ohio statutes encroach upon that expression, however, that fact does not end the inquiry.
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> . . . [In] *Konigsberg v. State Bar of California*, 366 U.S. 36, 49, 81 S.Ct. 997, 1006, 6 L.Ed.2d 105 (1961), . . . the Supreme Court [stated] . . .:
>
> > [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.
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> *Id.* at 50-51, 81 S.Ct. at 1006. . . .

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7. The Ohio district court described the nature of the motion picture industry in some detail. 496 F.Supp. at 414-415.

The Act [is not directed at the content of expression]. It is trade practice legislation, directed at the motion picture industry as opposed to other industries, not because that industry communicates ideas, but rather because, as plaintiffs readily acknowledge, the market structure of that industry is unique.

The Ohio Act is clearly content-neutral. It is an economic regulation operating on all distributors and exhibitors acting within Ohio regardless of the content or subject matter of the films involved. To the extent that it affects expression, it does so only incidentally.

As such the Act falls within that category of "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise," which should be upheld when "justified by subordinating valid governmental interests." *Konigsberg, supra*, 366 U.S. at 50-51, 81 S.Ct. at 1006-07. . . .

Determination of the constitutionality of such legislation necessarily entails a balancing of the legitimate governmental interests it serves against its impact on the protected expression.

In *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), *rehearing denied*, 393 U.S. 900, 89 S.Ct. 63, 21 L.Ed.2d 188, the court elaborated on the balancing test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is

> no greater than is essential to the furtherance of that interest.

496 F.Supp. at 432-33 (footnotes omitted).[8] We agree

8. *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), relied on below, 520 F.Supp. at 980, 982, 985, is distinguishable from this case. In *Schaumburg*, a statute forbade door to door solicitation by groups which used less than 75% of the proceeds for the group's charitable purposes. *Id.* at 634, 100 S.Ct. at 834-35. Unlike the statute at issue in this case, the statute in *Schaumburg* was on its face a "direct and substantial limitation on protected activity." *Id.* at 636, 100 S.Ct. at 836. Here, the statute has no facial impact upon speech and does not directly regulate speech or content at all.

Schad v. Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), also cited by the trial court, involved an ordinance which forbade all live entertainment and thus constituted a "substantial restriction of protected activity." 452 U.S. at 72, 101 S.Ct. at 2184. Its adverse impact on "communicative activity" was direct and unjustifiable. *Id.* at 71-72, 101 S.Ct. at 2184-85.

The state actions challenged in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980), and in *In re RMJ*, ____U.S. ____, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982) involved direct regulation of content. In *Consolidated Edison*, defendant had forbade "the inclusion in monthly electric bills of inserts discussing controversial issues of public policy." 447 U.S. at 532, 100 S.Ct. at 2330. The Supreme Court construed this as a "content-based regulation," *id.* at 537, 100 S.Ct. at 2333, and as a regulation of "speech on the basis of its subject matter." *Id.* at 536, 100 S.Ct. at 2332. Thus, the Court noted, "the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Id.* at 540, 100 S.Ct. at 2334. In *RMJ*, the state had restricted lawyer advertising "to certain categories of information," thereby prohibiting certain speech altogether. ____U.S. at ____, ____, 102 S.Ct. at 932, 939. *See also Metromedia, Inc. v. San Diego*, 453 U.S. 490, 516, 101 S.Ct. 2882, 2897, 69 L.Ed.2d 800 (1981) (content-based restriction on billboards invalid under First Amendment) (plurality); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 94, 97 S.Ct. 1614, 1619, 52 L.Ed.2d 155 (1977) (law restricting signs "based on their content" ruled invalid under First Amendment).

In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), the Court

with the Ohio district court and with the Sixth Circuit, *see* 679 F.2d at 661, 663, that this framework embodies the correct approach to statutes like the Pennsylvania Act. However, the grant of summary judgment in this case precluded the application of this framework. The trial court could not evaluate the actual impact of the Act (if any) on First Amendment values;[9] could not assess the nature and weight of the state concerns which led to the Act's enactment; and could not balance the state

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Footnote 8 (Continued)
upheld a state rule which required that exhibitors at the Minnesota State Fair conduct sales, distribution and fund solicitation operations from a booth. *Id.* at 644, 101 S.Ct. at 2562. The Court decided that the state rule, which it construed to be a non-content-based time, place and manner restriction on speech, was not based on content and was valid under the facts before it.

Unlike the state rules challenged in *Schaumburg, Schad, Consolidated Edison, RMJ,* and *Heffron,* the statute at issue here is not a direct regulation of speech, but is rather a restriction on certain trade practices which may (or may not) have an indirect impact on speech. Whether the statute has any impact on speech and the extent (if any) of that impact are questions of fact. Whether the impact requires invalidation of the statute or parts thereof is a question of law.

9. The Ohio district court found, after trial and an exhaustive analysis of the facts, that the actual threat to First Amendment values was minimal, and consisted *solely* of the "risk of an occasional and minor delay in the release of a new film." 496 F.Supp. at 435. *See* 496 F.Supp. at 433-35 for the court's summary of the evidence relating to the First Amendment claims. *Inter alia,* plaintiffs' own witnesses "made it clear that the decision to finance and produce a particular film is not primarily motivated by considerations regarding its marketing." 496 F.Supp. at 434. Indeed, the court noted that the "evidence supports the inference that [plaintiffs' former practices] may discourage production and distribution of controversial films or of low-budget films with unknown artists." 496 F.Supp. at 434 n. 14.

We note that 10 of the 12 plaintiffs in this suit were 10 of the 11 plaintiffs in the Ohio suit.

concerns against the threat (if any) to the First Amendment.[10]

The Copyright Act

In addition to striking the Pennsylvania Act as unconstitutional under the First Amendment, the trial court ruled that the Act was preempted by the federal Copyright Act and therefore unconstitutional under the Supremacy Clause:

> The Act's limit upon the duration of the license, upon when a distributor may license, its prohibition of guarantees and advances, and its bar against licensing or negotiations prior to screening, as well as consummating a license without complying with rebidding requirements, all directly—and severely—restrict the rights of the licensor.

520 F.Supp. at 995. We disagree with the trial court's analysis.

Title 17 U.S.C. § 301(a) provides:

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10. Any argument that the Ohio statute accomplished the state's goals at too high a cost to the First Amendment faded in the face of the Ohio district court's factfinding that the only risk to the First Amendment created by the Ohio statute was a minimal risk of delay in exhibition. The Ohio district court balanced this minimal risk against the "substantial legitimate governmental interests served by the Act":

> the State's interest in readjusting the relative market strengths of exhibitors and distributors; in establishing fair and open bidding practices; protecting consumers from a rise in ticket prices; removing the opportunities for unfair dealing and as a result, inhibiting suspicion within the industry; and permitting Ohio exhibitors to exercise their independent business judgments in licensing films.

496 F.Supp. at 435. The list of reasons for the Pennsylvania Act set forth in § 203-2 of that Act includes these concerns in addition to others.

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Section 106 of the Copyright Act confers exclusive rights on the copyright holder to the following:

> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
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> (3) to distribute copies of phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
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> (4) in the case of . . . motion pictures . . ., to perform the copyrighted work publicly; and
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> (5) in the case of . . . individual images of a motion picture . . . to display the copyrighted work publicly.

The trial court stated that the issue before it was

> whether the Pennsylvania Act's broad and comprehensive regulation of the process of licensing copyrighted motion pictures conflicts with the objectives of Congress in its enactment of the Copyright Act.

520 F.Supp. at 995-996.[11] The Ohio district court, dealing with this question, analyzed in great detail the legal contentions of preemption raised by plaintiffs and the actual impact of the Ohio statutory scheme on the plaintiffs' copyrights. Plaintiffs in Ohio argued that the Ohio Act's prohibitions against conditioning the licensing of films on the payment of guarantees, against negotiations after an unsuccessful bidding, and against blind bidding all were preempted because they frustrated the Copyright Act's protections by depriving the copyright's owner of the right to dispose of its subject matter on the optimum terms. The Ohio court rejected this argument. The court noted that the Copyright Act, enacted pursuant to Article I, § 8 of the United States Constitution, was "based on 'the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.' [Citation omitted]." 496 F.Supp. at 446. The court further noted that " '[t]he copyright law, like the

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11. The Ohio district court noted that "[t]he first question . . . is whether the Ohio Act creates, grants or destroys any rights that are 'equivalent' to the exclusive rights of copyright set forth in 17 U.S.C. § 106." 496 F.Supp. at 443. The court continued:

> [The Ohio Act] neither creates rights equivalent to those within the scope of the federal act nor deprives copyright owners of the protections afforded by the federal copyright. The Ohio Act does not deprive motion picture copyright owners of their rights to prohibit reproduction, performance, distribution or display of their work; nor does it vest the rights to reproduction, performance, distribution or display in exhibitors or any other person. Indeed, by providing procedures for the licensing of a film, the Act recognizes *sub silentio* the right of the copyright owner to exhibit the motion picture and to grant an exclusive or restrictive license to others to exhibit it.

496 F.Supp. at 443. The Sixth Circuit agreed, 679 F.2d at 663.

This analysis and conclusion seem applicable to the Pennsylvania Act, at least on its face. The trial court in this case did not need to reach this question, however, because it ruled that the Copyright Act preempted the Pennsylvania scheme by limiting the exercise of federally created rights. 520 F.Supp. at 993.

patent statutes, make reward to the owner a secondary consideration.' *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158, 68 S.Ct. 915, 929, 92 L.Ed. 1260 (1948)." *Id.* at 446. The court continued:

> The Supreme Court has rejected the notion that because "a copyright is property derived from a grant by the United States," it is not subject to state regulation of the manner in which its product is marketed. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 128, 52 S.Ct. 546, 547, 76 L.Ed. 1010 (1932). Further, the Supreme Court has rejected claims that the exclusive right granted by Congress to distribute copyrighted material included the exclusive right to distribute it in the manner deemed most desirable by the copyright holder. *Watson v. Buck*, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941).
>
> In *Fox Film, supra*, the Supreme Court upheld a state's direct taking by imposition of a tax, of royalties derived from federal copyrights. Scarcely a more blatant, effective method of reducing the author's award can be imagined. Yet the Court stated:
>
> > The statute confers upon the author after publication the exclusive right for a limited period to multiply and vend copies and to engage in the other activities described by the statute in relation to the subject matter, U.S.C., Tit. 17. In creating this right, the Congress did not reserve to the United States any interest in the production itself, or in the copyright, or in the profits that may be derived from its use. Nor did the Congress provide that the right, or the gains from its exercise, would be free of tax. The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself

> with simply exercising the right to exclude others from using his property. The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.
>
> * * * * *
>
> . . . The nature and purpose of copyrights place them in a distinct category and we are unable to find any basis for the supposition that a nondiscriminatory tax on royalties hampers in the slightest degree the execution of the policy of the copyright statute.

Fox Film, supra, 286 U.S. at 127, 131, 52 S.Ct. at 548 (citations omitted).

The authority of the states to regulate market practices dealing with copyrighted subject matter is well-established. Thus, for example, the Supreme Court has made it clear that the existence of a copyright does not permit its owner to contract concerning it in ways that suppress competition in violation of federal antitrust laws. 15 U.S.C. § 1, *et seq. Interstate Circuit v. United States,* 306 U.S. 208, 230, 59 S.Ct. 467, 476, 83 L.Ed. 610 (1939). Similarly, ownership of a copyright does not entitle a company to abuse the market power it obtains thereby by engaging in a *per se* illegal tying arrangement, *see, e.g., United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 156-57, 68 S.Ct. 915, 929, 92 L.Ed. 1260 (1948), price fixing, *see, e.g., Watson v. Buck,* 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941), or other fraudulent or deceptive practices, *cf. Mariniello v. Shell Oil Co.,* 511 F.2d 853 (3d Cir. 1975); *Hearing Aid Ass'n of Kentucky, Inc. v. Bullock,* 413 F.Supp. 1032 (E.D.Ky. 1976).

> The State of Ohio is no more interfering with the legitimate rights of owners of copyrighted motion pictures by regulating the ways in which plaintiffs and other producer-distributors license their product in order to achieve fair and open bargaining than were the states in passing the legislation upheld in those cases.

496 F.Supp. at 446-47. The Sixth Circuit, in affirming the trial court on the Copyright Act challenge, stated:

> we do not find authority for the argument that state trade regulation which affects distribution procedures and, indirectly, monetary returns from copyrighted property is invalidated implicitly or explicitly by the terms of the Copyright Act . . . or the copyright clause [of the United States Constitution]. After thorough analysis, Judge Duncan rejected each of these claims, 496 F.Supp. at 441-48. We agree with his decision and his analysis.

Allied Artists, 679 F.2d at 662-663.

The trial court in this case ruled that the Pennsylvania Act, *on its face*, is preempted by the Copyright Act because it limits the exercise of federally created rights and therefore " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Jones v. Rath Packing Co.*, . . . 430 U.S. at 526, 97 S.Ct. at 1310." 520 F.Supp. at 996. Specifically, the trial court ruled that the Pennsylvania Act's prohibitions against advances, against guarantees in combination with percentage payments, against blind bidding, against private negotiations for licenses where all bids are rejected, and against first runs of more than 42 days were all preempted by the Copyright Act. 520 F.Supp. at 994-95.

It was incorrect to reach this conclusion on summary judgment. Whether the prohibitions contained in the Pennsylvania Act *in fact* "stand as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress" was in dispute. The Act on its face contains no threat to the copyrights themselves: the Act does not take away from plaintiffs and give to another the right to reproduce the film, to prepare derivative works based on the film, to distribute the film, or to license its performance. With regard to the question of whether the Pennsylvania Act unconstitutionally prevents or interferes with the goals of the Copyright Act, defendants contend that as a matter of fact the Pennsylvania Act has little or no impact upon the exercise of any federally created rights. The question of whether and to what extent the Pennsylvania Act interferes with attaining the "purposes and objectives of Congress" is one which must be resolved before the trial court can decide, as a matter of law, whether the interference (if any) is such as to require invalidation of all or part of the Pennsylvania Act on preemption grounds.[12] Thus, while we

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12. The Ohio district court, after trial, ruled that the Ohio Act did not in fact interfere with the "purposes and objectives" of the Copyright Act. To the contrary, the Ohio district court found that the Ohio Act *furthered* Copyright Act goals: *inter alia*, the prohibition against blind bidding and the requirement of a trade screening protect exhibitors from being compelled to rent movies without first being able to assess their quality, and " 'the reward [to an author or artist] does not serve its public purpose if it is not related to the quality of the copyright. . . .' [*United States v. Paramount Pictures, Inc.*, 334 U.S. at 158, 68 S.Ct. at 929]." 496 F.Supp. at 447. Furthermore, the Ohio court found that the Ohio Act, by forbidding blind bidding and its inevitable result of requiring theaters to book movies far in advance, in fact "further[s] the wide dissemination of copyrighted works" by increasing the opportunity of "independents for the showing of their films." 496 F.Supp. at 447-48.

We note that, unlike the Ohio Act, which forbids conditioning licenses on the payment of guarantees, the Pennsylvania Act forbids all guarantees where payment to the distributor will be based on box office receipts. Further, the Pennsylvania Act forbids first runs of longer than 42 days without plans for expanding the run: the Ohio Act contains no equivalent prohibition. Thus, particularly with regard to the 42-day provision, the Pennsylvania Act may have a greater impact upon plaintiffs copyright rights than the Ohio Act.

agree with the framework of analysis set forth by the Ohio district court and adopted by the Sixth Circuit, we cannot apply that framework in a summary judgment context, because the parties do not agree on whether the Pennsylvania Act in fact precludes the "accomplishment and execution of the full purposes and objectives" of the Copyright Act.

For the foregoing reasons, we will reverse the trial court's grant of summary judgment and remand this case for trial.

DISTRICT COURT FINDINGS AND CONCLUSIONS, AUGUST 5, 1985

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 80-1179

ASSOCIATED FILM DISTRIBUTION
CORPORATION, et al.

v.

The Honorable Dick
THORNBURGH, et al.

Aug. 5, 1985

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KATZ, *District Judge*

I uphold the constitutionality of the Pennsylvania Feature Motion Picture Fair Business Practices Law.[1] That Act regulates certain trade practices in the licensing relationship between those who distribute films and those who exhibit them. The distributors contend that the Act violates their rights to freedom of speech, offends the right of Congress to regulate interstate commerce, is preempted by federal copyright legislation, and is contrary to the Pennsylvania Constitution's prohibition of "special laws."[2]

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1. 73 P.S. §§ 203-1 through 203-11.

2. The history of this case includes a grant of summary judgment for the plaintiffs on the grounds that the Act violated the First

I. *Background: Mutual Dependency*

The relationship between exhibitors and distributors is one of mutual dependence. Distributors need theatres in which to play their films; exhibitors need films to play in their theatres. This symbiotic relationship has given rise to a long history of sharp dealing. *See United States v. Paramount Pictures,* 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948).

The plaintiffs in this action are the major distributors of motion pictures in the United States. They distribute most films. Those which they do not distribute are released by foreign companies or small independents.

Although there are national theatre chains, most theatres in Pennsylvania are owned by local chains or by independent exhibitors. The exhibition business in some areas of the Commonwealth is competitive, while in other areas a chain or an individual owns all the theatres. If a distributor wishes to play a film in a certain area, it must license that film to an exhibitor in that area. Not all theatres are alike. Factors such as seating capacity, location, and parking are important in what is a prime theatre.

All exhibitors depend on the product available from distributors. Theatre owners need new pictures on their screens. Exhibitors fear the mythical screen without a picture; distributors fear the mythical film without a theatre.

During the peak seasons, Christmas, Easter and summer, there is usually ample product for exhibitors. At other times, however, distributors release fewer films.

Footnote 2 (Continued)
and Fourteenth Amendments and the Supremacy Clause of the United States Constitution. *See Associated Film Distributors, et al. v. Thornburgh,* 520 F.Supp. 971 (E.D.Pa.1981) (hereinafter *AFD* I). The Court of Appeals reversed the order. 683 F.2d 808 (3d Cir.1982) (hereinafter *AFD* II).

This is a problem for both small exhibitors operating one theatre and for the giants of the exhibition field who own all the screens in an area. The more screens an exhibitor owns, the more devouring its need for film product. While a theatre owner can subsist on the average film, the eternal hope is to garner a blockbuster.

Distributors license films by two methods, bidding and negotiation. The Pennsylvania Act defines a bid as

> [a] written or oral proposal by an exhibitor to a distributor, which proposal is in response to an invitation to bid or negotiate and states the terms under which the exhibitor will agree to exhibit a feature motion picture.

73 P.S. § 203-3.

In practice, distributors use bidding in areas where competition among exhibitors exists. Although bidding may take place over the telephone, normally the distributor sends exhibitors in the area an "invitation to bid" which contains a brief description of the film, the time at which it will be available and the suggested licensing terms. The exhibitor submits a bid which will include not only financial terms, but also minimum length of run and any requested "clearances" over other theatres in the area. A clearance is an assurance that another theatre will not obtain the same film. The distributor, taking into account both the quality of the theatre and the terms of the bid, presumably selects the most favorable bid. The distributor can reject all bids. Before the Pennsylvania Act, the distributor could negotiate with individual theatres after rejecting all bids. Traditionally, terms on licenses procured by bidding are "firm"; the distributor will not be expected to reduce the agreed terms if the picture is unsuccessful.

Distributors normally use negotiation in areas where there is little or no competition among exhibitors. Under

negotiation, a representative of the distributor contacts a specific exhibitor and, without soliciting other offers, attempts to work out a licensing arrangement. Traditionally, terms under negotiated licenses are not firm. If a picture bombs, the distributor may renegotiate the terms downward.

Another method of licensing is "competitive negotiation." Competitive negotiation is oral bidding. The distributor contacts the exhibitor and indicates that he is soliciting offers from more than one theatre. As with bidding, the industry practice is that terms licensed under competitive negotiation are considered firm.

In the 1950's and 1960's films were usually licensed by flat rental or by a sliding scale in which exhibitors paid a higher percentage of the box-office gross as the gross increased. As time went on, distributors stopped using sliding scales and flat rentals. Film rental is now calculated by percentage rental and a house allowance. Under this system, the distributor and exhibitor agree on a house allowance, a specific dollar amount which is supposed to represent the exhibitor's weekly expenses. The exhibitor keeps 10% of the weekly gross above this house allowance; the remaining 90% inures to the distributor. The contract, however, almost always provides that the distributor will receive a minimum percentage of the box office gross. The amount of this minimum percentage has increased over the years. Currently, the distributor usually demands a minimum of seventy percent of the box office gross for the first week of the exhibition (or "run"). The percentage decreases in the succeeding weeks of the run.

Several events occurred in the past few decades which have made business more difficult for exhibitors. The first was a significant decrease in the amount of film product available. The second was the increase of "blind bidding," defined in the Pennsylvania Act as

> [b]idding, negotiating, offering terms, accepting a bid or agreeing to terms for the purpose of entering into a license agreement prior to a trade screening of the feature motion picture that is the subject to the agreement.[3]

73 P.S. § 203-3.
A consent decree between most of the major distributors and the United States Department of Justice limited blind bidding between 1968 and 1975 by preventing the distributors from blind bidding more than three pictures per year. When the decree expired, the practice of blind bidding increased dramatically. By the late 1970's most films, and virtually all those that were considered potential "blockbusters," were blind bid.

Economic power is highly concentrated in the hands of a few distributors who control most feature films. Concentration of exhibitors in local markets is growing. In the business relationship between distributors and exhibitors, the distributors probably have the upper hand.

II. *Making a Motion Picture*

Making a film is a complicated process, characterized by ingenuity in adjusting. While it may be true that there is no business like show business, show business is also big business. An average movie costs ten to twenty million dollars to make and distribute.

It is difficult to predict how long it will take to make a film. Target dates are set before shooting begins. Such factors as script revision, the health of stars and key members of the crew and the weather can cause significant delays. Principal photography lasts three to five months. When shooting is finished, the post-production process begins. Post-production may take up to a year. It

3. A trade screening is the showing of a feature motion picture by a distributor which is within the Commonwealth and is open to any exhibitor. *See* 73 P.S. § 203-3.

is during this time that music and special effects are added, the quality of the sound and color are improved and the film is edited.

During post-production, a "rough cut" of the film is made from the original negative. The director turns the "work-in-progress" into a finished product. Some directors work quickly, others at a snail's pace.

The main circumstances which may slow the production and post-production processes have always existed and have nothing to do with legislation. It is often necessary to accelerate post-production by adding technicians, renting extra equipment or paying for costly overtime. Once a release date for a film is set, changing that date is expensive. Distributors buy national television advertising time for a film a year before its release. A delay in release means decline in the effectiveness of the advertising. Postponement forces the film-maker and distributor to incur extra interest costs, creates a risk that a timely film will become stale, and may cause a film to miss a prime release season. Acceleration is the way the problem is solved. It is rare for a film to miss its release date.

III. *The Pennsylvania Act*

The Pennsylvania Feature Motion Picture Fair Business Practices Law was enacted in 1980. The legislature described its purposes in passing the Act in 73 P.S. § 203-2:

> The General Assembly of the Commonwealth of Pennsylvania finds and declares that the licensing and distribution of feature motion pictures to theatres in this Commonwealth, including the rights and obligations of distributors and exhibitors, vitally affects the general economy as well as the access of

the public to works of artistic expression and opinion. In order to promote the public interest and public welfare of this Commonwealth to:

(1) insure unabridged access for the public to artistic expression and opinion in feature motion pictures at reasonable prices and at many different locations;

(2) avoid undue control of the exhibitors by the distributors;

(3) foster vigorous and healthy competition in offering feature motion pictures for the benefit of the public by prohibiting practices through which fair and honest competition is restrained, destroyed or inhibited;

(4) promote the wide geographical dissemination at reasonable prices to the public of ideas, opinions and artistic expression in feature motion pictures;

(5) prevent delay in the exhibition of feature motion pictures to the public in theatres playing subsequent to the first run showing;

(6) prevent theatres from unnecessarily going out of business, thereby resulting in reducing the number of small independent businesses and unemployment with loss of tax revenues and other undesirable consequences;

(7) prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of distribution and exhibition of feature motion pictures within the Commonwealth;

(8) promote fair and effective competition in that business;

(9) benefit the movie going public by limiting the long and extensive first runs so that additional theatres, in a given area, may also exhibit the same feature motion picture and at possibly a lower admission price; and

(10) prohibit blind bidding by insuring that exhibitors have the opportunity to view a motion picture and know its contents before committing themselves to exhibit it in their communities;

it is necessary to legislate regulations and standards pursuant to the exercise of the police power of this Commonwealth governing the relationship between feature motion picture distributors or licensors and exhibitors serving the public by establishing fair business practice procedures for the licensing and distribution of feature motion pictures within the Commonwealth of Pennsylvania and to provide remedies for the violation of this act, including damages and attorneys' fees.

In order to effectuate the objectives described, the Pennsylvania Act regulates the licensing of films in the Commonwealth.

First, the Act flatly prohibits the practice of blind bidding. The act prevents exhibitors and distributors from negotiating for a license or entering into a licensing agreement before a film is trade screened in Pennsylvania.[4] 73 P.S. § 203-4.

The Act does not permit licensing agreements to include provision for the payment of guarantees or advances. 73 P.S. § 203-5, 6. A guarantee is a promise by the exhibitor to the distributor to pay a minimum fixed

4. Approximately one half of the states have enacted similar trade screening requirements.

dollar amount regardless of box office gross.[5] When a film does not earn as much as its guarantee, the difference is "unearned film rental." This sum is not refundable. An advance is a promise by the exhibitor to pay part of the film's anticipated rental to the distributor before the exhibition. If the film rental does not equal the advance, the distributor is supposed to refund the difference.

The Act also contains a "42-day clause," which prevents distributors from granting exhibitors exclusive runs for more than 42 days without making provision to expand the run to other theatres within the geographical area.[6] 73 P.S. § 203-7.

The Feature Motion Picture Fair Business Practices Law also regulates bidding procedures. 73 P.S. § 203-8. It requires open bidding. Those exhibitors who submitted bids have a right to be present when bids are opened. Within sixty days after bids are opened, a bidding exhibitor may examine any bid that was made for that particular run, even if the distributor has rejected all bids. When a distributor accepts a bid, it must notify all the bidding exhibitors of the identity of the successful exhibitor and the terms of the successful bid. The Act also

5. The Act prohibits guarantees only where payment to the distributor is otherwise based in whole or in part on attendance or box office receipts. Thus, the Pennsylvania Act does not forbid distributors and exhibitors from entering into agreements where the exhibitor's only payment to the distributor consists of a "flat rental."

6. § 203-3 of the Act defines a "run" as:

> [T]he continuous exhibition of a feature motion picture in a defined geographical area for a specified period of time. A "first run" is the first exhibition of a feature motion picture in the designated area; a "second run" is the second exhibition and "subsequent runs" are subsequent exhibitions after the second run. "Exclusive run" is any run limited to a single theatre in a defined geographical area and a "nonexclusive" or "multiple run" is any run in more than one theatre in a defined geographical area.

requires rebidding. If a distributor rejects all bids, it must so inform all bidding exhibitors, issue new bid solicitations, and bid the film again. Thus, once a distributor chooses to license by bidding, it cannot switch to negotiation if the terms offered in the bids received prove disappointing.

IV. *The Effect of the Act*

The effect of the Act on the motion picture business is relatively minor. Both sides exaggerate its effect. The extravagant claims of the parties give rise to a mythology about the effects of the Act which far outdistances the credible evidence. The distributors' claims, unsupported by credible evidence, range from complaints that the Act inhibits the artistic development of pictures to complaints that compliance with the Act requires expenditure of great sums for distribution, promotion and marketing. There were claims that the Act has contributed to the elimination of certain types of special effects and has precluded the use of shopping mall promotions. The exhibitors, on the other hand, claim that the Act is a panacea protecting them from their helplessness in the market place against the overwhelming market power of the distributors. In fact, there are both distributors and exhibitors who are unfair competitors. The distributors' history includes the practices leading to the *Paramount* decree. Some exhibitors have engaged in collusive conduct by agreeing to split available film with competitors. The range of unfair practices by both sides is extensive. While distributors have often misrepresented the quality, nature and critical reception of a film, powerful exhibitors have often oppressed smaller competitors by using their deeper pockets to offer guarantees related to the merits of a bidding situation. Favored arrangements between large distributors and large exhibitors led in the past to sneak looks at competitors' bids. Clearances for some theatres unreasonably restricted wide and prompt

dissemination of films. "Customer relationships" still exist, in which some exhibitors commit screens to particular distributors long before trade screening. There are also claims of sham bidding, where an exhibitor bids high terms but consistently pays at a lower renegotiated rate.

Against this background of seamy conduct and exaggerated claims, the Pennsylvania Act modestly regulates a variety of unfair trade practices. The Act does not restructure the movie industry, nor does it address all its inequities. The failure of the law to correct all of the problems of this complex and sometimes shady business, however, is no reason to strike down a modest effort at reform.

A. *The Trade Screening Requirement*

Plaintiffs have attacked the trade screening requirement of the Pennsylvania Act on several grounds. The distributors maintain that they prefer to trade screen whenever possible. They allege, however, that the trade screening requirement causes delay in the release of motion pictures and that, because they cannot license until after a film has been screened, they are often foreclosed from prime theatres.

The distributors see themselves faced with a Hobson's Choice. Delaying a release date is costly and, because timing can be a key element in a film's success, potentially disastrous. The other alternative is to accelerate work on the project in order to complete a "trade screening" print to be shown to exhibitors. Such prints represent the work-in-progress and are not equivalent to the print ultimately released to the public. The distributors complain that this process diverts resources from the completion of the final print, is extremely expensive, and is wasteful because trade screening prints are ultimately useless. They claim that trade screening prints are usually incomplete, unpolished and, therefore, in no

way representative of the final product. The evidence at trial, however, showed that there are substantial benefits to trade screening and that the burdens alleged by plaintiffs have been overstated.

The main benefit of the trade screening requirement is prevention of certain deceptive trade practices by distributors. The evidence supported the notion that before trade screening legislation, distributors were licensing films by tactics ranging from exaggeration to outright misrepresentation.

In the days of blind bidding, licensing often took place about a year before the actual release of a film. The only information an exhibitor received about a picture besides industry rumor was the puffing contained in a brief bid solicitation letter. The letters usually included the name of the film, the director and a paragraph summarizing the plot. Such letters uniformly described the upcoming film in glowing terms. With this information, the exhibitor had no rational way to differentiate a blockbuster from a disaster, nor could it determine whether a film would play well in a particular area. Bid solicitation sometimes passed beyond hype into deception.

A 1977 bid solicitation for "THE SWARM" promised "another giant spectacular." The letter touted the film as starring several celebrities. By the time these letters were sent out, however, Warner Brothers had already performed a study of marketing opportunities for "THE SWARM," which showed little audience interest in seeing the film. Moveover, most of the actors advertised as "starring" in the movie had only cameo roles. The film was a disappointment at the box office. As a result of a lawsuit brought by Texas exhibitors against Warner Brothers under the Texas Deceptive Practices Act, a jury in federal district court in Texas explicitly found that

Warner Brothers committed false, misleading or deceptive acts or practices.[7]

A more recent example is the Paramount film, "BEST DEFENSE." The bid solicitation stated that Dudley Moore and Eddie Murphy would "join forces in an all-out assault at the military and the funnybone." The movie was touted as "a rare and extraordinary treat, bringing together two of the screen's hottest and most versatile comic giants. . . ." In fact, Murphy was on screen for only fifteen to twenty minutes and he and Moore did not have one scene together.

Exhibitors admit that their judgment on films is far from perfect, but testimony supported the common sense notion that the best way to evaluate the box office potential of a film is to see it. Knowing a film's stars, its director or the book on which it is based is no substitute for actually seeing the film. It does not matter that the sound and visual effects or editing are incomplete. The overall impression of the story and performances are the most important features in judging a film and they can be assessed even when the film is screened with an unfinished print.

Trade screening also allows exhibitors to determine whether a film is likely to sell to their particular community. Films which are blind bid have often not received a rating from the Motion Picture Association of America at the time they are licensed.

Trade screening allows exhibitors to predict at which location a film will receive the best reception. Even large exhibitors who license virtually every picture gain from trade screening, which allows them to judge

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7. The jury, however, failed to find that those acts or practices proximately caused injuries to the plaintiffs. *See Presidio Enterprise, Inc. et al. v. Warner Brothers Distributing Corporation*, Civil Action No. A-79-CA-290 (W.D. Texas).

whether to place a given picture in a large or small theatre and to vary their bid according to what they perceive to be the worth of the film.[8]

The plaintiffs contend that trade screening cannot be too important to exhibitors because of sparse attendance at some screenings. They base their argument on sign-in sheets for screenings. These sheets are somewhat misleading. One exhibitor had no recollection of ever being asked to sign in. Major exhibitors almost always send a representative and many small exhibitors sometimes employ a single booking agent to license films.

The plaintiffs concede that screenings for films rumored to be potential blockbusters are well attended. These are the movies for which an exhibitor may bid high terms and a long run. If an exhibitor licenses such a picture on those terms and the picture proves to be a flop, the exhibitor, especially the small one, may be faced with disaster. The Pennsylvania Act allows movie exhibitors to use their own judgment to determine whether such a film will succeed. The public benefits from requiring reasonable disclosure to afford the opportunity of an informed choice.

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8. Some exhibitors maintain customer relationships with distributors in which they commit screens to that distributor in advance of trade screening. The plaintiffs argue that this undercuts the need for anti-blind bidding legislation. Customer relationships, however, are not universal. Small exhibitors do not have such arrangements. Those large exhibitors with customer relationships contend that they have only tentatively committed a screen to a certain company. The decision of what film to play on which screen has not been made. Trade screening also determines the terms they will bid for the film. Even with a customer relationship, an exhibitor is unlikely to offer high percentage terms or a long run if a picture does not seem likely to do well.

One ancillary benefit to trade screening is its benefit to unknown but worthwhile film makers. Trade screening allows exhibitors to judge films on what they perceive as real worth, rather than purely on the basis of reputation. Successful films which would otherwise be passed up because they contain unknown quantities receive more exposure. This may benefit the smaller and often more innovative distribution company.

While the benefits of the trade screening requirements are substantial, the burdens alleged by the plaintiffs are overstated.

There was a great deal of testimony about the costs of delaying a film's release date. Trade screening legislation, however, has simply not caused delay in the release of motion pictures. Plaintiffs point to a handful of films which missed their release dates, none because of the trade screening requirement. Meeting the deadline for producing a trade screening print is a burden which plaintiffs exaggerate in this litigation; the real world burden is the deadline of a national release date. The latter deadline causes the costs which plaintiffs attribute to the trade screening requirement. If a film comes close to meeting its production schedule, there will be no delay because of trade screening. A distributor can successfully license a film within 24 to 48 hours of trade screening. There are, of course, films delayed because of factors unrelated to the trade screening requirement. These other factors may include a director who takes an extraordinarily long time to edit a film or the illness of a star. The distributors made no credible showing that the trade screening requirement has had any effect on the number of films that missed their release date.[9]

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9. The Court gave little weight to the testimony actually offered that a given film was delayed because of the trade screening law. Such testimony was presented in a conclusory fashion and was not very helpful to the Court's resolution of the complex issues presented in this case.

Plaintiffs contend that the trade screening requirement reduces the effectiveness of advertising because it usually prevents films from being licensed to specific theatres until shortly before release. These contentions are unfounded. Local advertising can link a film to a theatre on short notice before release. National advertising tends not to be theatre specific and such advertising can therefore appear in advance of licensing. The evidence indicated, in fact, that there has been no change in strategy concerning national advertising because of the Act.

The plaintiffs also complain that because they cannot license their films far enough in advance they are often precluded from placing their movies in prime theatres. The requirment of trade screening pictures does not foreclose distributors from access to the more desirable theatres at peak seasons. Before the Act, distributors could book theatres long before the product was available. The Act changes the race's starting line to the availability of a trade screening print. It gives the race to the swift producers of movies rather than to the swift preemptors of theatres. In doing so, it makes the merits of the films more relevant. Moreover, the industry as a whole is not injured. If one company has production difficulties and is unable to screen its new film until a month before the release date, the company which finished its film according to schedule and trade screened two months in advance benefits. This is hardly an irrational result.[10]

Plaintiffs' next complaint is that the act forces the production of a separate trade screening print which is expensive to make and diverts valuable resources from the work being performed on the final print. As to the

10. Plaintiffs' farfetched claim that the act effectively precludes the use of mall promotions because such promotions must be planned long in advance and must be tied to a theatre which will show the film is without merit. There are myriad methods to promote and advertise new films unaffected by the passage of the Pennsylvania Act.

first contention, the costs of producing a trade screening print are insignificant when compared to other production and post-production expenses. The oft-told tale of the horrors of inconvenience in using the corporate Lear Jet to shuttle a trade screening print between cities makes one wonder from what important missions the jet was diverted. As to the second contention, plaintiffs' own witnesses testified that acceleration of post-production has always been a way of life in the movie business. There was no credible evidence that the diversion of resources to make a trade screening print has had any effect on the quality of pictures being released.

The distributors have also contended that a trade screening print is simply not representative of the final product. Such prints often lack titles, music, color-coding and various other special effects and finishing touches. The exhibitors who testified, however, all agreed that the quality of the prints is adequate to judge the basic worth of the film.[11] Also telling is the fact that certain distributors have on occasion shown trade screening prints as sneak previews for audiences and the press.

B. *Guarantees and Advances*

The most troublesome regulation in the Pennsylvania Act is the prohibition of guarantees and advances.[12]

11. The Court viewed the first reels of two trade screening prints and compared them to the finished prints of those reels. Although there were clear differences between the unfinished and final prints, the trade screening prints adequately represented the final versions. I felt able to determine the nature of the films from the screening prints. Moreover, both films contained disclaimers that the prints were unfinished.

12. The Ohio statute regulating licensing practices in the movie industry does not outlaw all guarantees and advances, but forbids conditioning licenses on the payment of guarantees and advances. Thus, distributors may not solicit guarantees and advances, but exhibitors may offer them. Moreover, the Ohio Act regulates only advances more than fourteen days before the first exhibition of a picture. Ohio R.C. § 1333.06.

The distributors' mythology is that guarantees and advances enable small town exhibitors to obtain films earlier than they otherwise would by ensuring that the distributor will receive enough to cover the cost of the print. The exhibitors' claim is that the law against guarantees and advances is necessary to protect them against the extortionate demands of the distributors against which they are otherwise helpless. I do not believe either claim.[13] I do find, however, that there is significant public benefit to the prohibition of guarantees and advances and that the burdens of such provisions are minimal.

The most significant benefit of prohibiting guarantees and advances is the protection of independent exhibitors from the predatory practices of larger exhibitors. Large exhibitors often use their deep pockets to put up substantial guarantees and advances. The small exhibitor simply cannot compete fairly even if his theatre and the terms he offers are as good or better than the larger exhibitor.[14] He may have to seek bank financing to pay even a modest guarantee or advance.

An exhibitor with a deep pocket is able to put films beyond the reach of a smaller competitor regardless of which theatre is the more appropriate showcase. It is to the public's benefit that there be competition in exhibiting films and that large exhibitors do not squeeze smaller ones out of business.

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13. The exhibitors' claim that the distributors' use of guarantees is unfair had more validity when blind bidding was permitted. There was a great deal of testimony about exhibitors losing large sums of money because they put up substantial guarantees based on inaccurate information about a film.

14. At trial, a representative of AMC, the third largest exhibitor in the country, testified that his company viewed guarantees as a "viable" method of licensing film. Other witnesses from large exhibition chains freely admitted offering sizeable guarantees when competing against smaller theatres.

Plaintiffs' position that guarantees and advances help small exhibitors break into the market and allow theatres in small towns to obtain film is unsupported by credible evidence. Unless two theatres are relatively equal, distributors choose on the basis of box office potential. A smaller, less attractive theatre will rarely, if ever, beat out a larger, more attractive theatre in a good location. Moreover, plaintiffs' own expert testified that a guarantee is a useful competitive tool for an exhibitor only when it is substantial enough to approximate the amount the distributor expects to earn from the license. Offering a marginal sum as a guarantee will not help the small exhibitor who would find it impossible to come up with a guarantee sizeable enough to secure a film.

The credible evidence also fails to support plaintiffs' theory that films which would otherwise not play in small towns are able to appear when exhibitors can offer guarantees large enough to cover print costs. There was testimony from exhibitors with theatres in small communities that they had at times attempted to buy a film print in order to show a particular film. These offers were rejected. The experience of these exhibitors was that guarantees had never made the difference in obtaining or not obtaining a film.

When exhibitors put up sizeable guarantees on films which produce disappointing box office receipts, they often play these pictures for longer than they normally would to reduce losses. Despite sagging popularity, exhibitors milk the runs of such films to the exclusion of otherwise available movies. Thus, the prohibition of guarantees benefits the public by reducing the incentive of exhibitors to play motion pictures beyond their useful life.[15]

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15. There was also evidence that some exhibitors occasionally raised ticket prices on films for which they paid large guarantees.

Again, plaintiffs overstate the burdens arising from the prohibition of advances and guarantees. They claim that guarantees moderate the risk the distributor takes in producing a film by shifting some of that risk to exhibitors. Plaintiff's statistical study indicated that in unregulated periods in Pennsylvania, 4.3% of plaintiffs' total film rental was unearned guarantee income. Plaintiffs' own economics expert testified that the presence or absence of guarantees does not have a significant impact on film rental.

Plaintiffs argued that advances serve the purpose of assuring payment from exhibitors who are considered poor credit risks or slow payers. There are, however, other effective methods to deal with film rental delinquencies. One such method is not supplying film to delinquent exhibitors. There was also evidence that advances were often solicited from exhibitors with excellent payment records, casting doubt on plaintiffs' argument about the purpose of advances. When film rental does not equal the advance, the distributor does not usually repay the theatre owner at the end of the run, but holds the money as a credit balance until the next picture. Such a practice is onerous for the small exhibitor. While both distributors and exhibitors pay their debts to each other with small honor, there is no credible evidence that the prohibition of advances materially affects the credit relationship or the collection of debts.[16]

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16. Plaintiffs have made some farfetched claims about the evils of prohibiting guarantees and advances. Their proposed Findings of Fact complain that these provisions "may reduce the amount of internal capital available for other films and may, over the long run, reduce the distributors' willingness and ability to finance films without a built-in market." Plaintiffs, before trial, abandoned their claim that the Act affects financing for films and presented no evidence on this issue. The distributors have also contended that an exhibitor who has paid a substantial guarantee for a film will promote the film more vigorously than one who licenses a film without a guarantee term. This position is not supported by the evidence.

C. *The 42 Day Clause*

§ 203-7 of the Pennsylvania Act provides:

> No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to a second run or subsequent run theatres within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.

This part of the statute was inartfully drafted,[17] and distributors interpret its requirements differently. Some read it to mean that no theatre may play a film for longer than 42 days. There is no support for such an interpretation, however. The clause prohibits contracts which grant an exhibitor an exclusive run in an area for more than 42 days. There is nothing in the law that prevents a distributor and exhibitor from agreeing to a run of more than six weeks as long as the license provides for expansion on the 43rd day. There is nothing in the law which prevents a distributor from contracting with an exhibitor for an exclusive run of six weeks and then, after bidding or negotiation, contracting for another exclusive engagement with the same theatre owner.

Plaintiffs contend that some films have opened late in Pennsylvania because of the 42-day clause. Distributors release films which are likely to start slowly at the box office and then build in popularity on what is called a "platform" release strategy. These films open initially in a handful of theatres in a few big cities and rely on

17. For instance, the statute leaves the definition of a "geographical area" unclear. It is not necessary for me to resolve these ambiguities.

word-of-mouth to gain audience size. Distributors nurture these films slowly and do not release them broadly until they have attained a certain level of popularity. The plaintiffs contend that the 42-day clause prevents them from maintaining control over this type of slow release and that, as a result, they have chosen not to open some films in Philadelphia at the early states of platform release. The Act, however, does not cause such a delay. At most, it is a minor factor in a marketing decision exclusively within the control of the distributor. It is the distributors' strategic choice, not the Act, which may delay release. In addition, this problem affects so few pictures that its impact is minimal.[18]

Plaintiffs' next complaint is that as a result of the 42 day clause exhibitors are less likely to offer high rental terms on certain films because the distributors cannot guarantee an exclusive run of longer than six weeks. Such complaints are not suported by any credible evidence in the record. It is more likely that the clause will increase film rental for those films that are blockbusters or which turn out to be more popular than expected. When such films are reoffered after 42 days, they will probably garner higher percentage rental terms for the first weeks of the new license than they would for the seventh and succeeding weeks of the original agreement.[19]

The 42 day clause also has benefits for the Pennsylvania moviegoer. The purpose of the provision is to pro-

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18. One picture which allegedly opened late in Philadelphia because of the 42 day clause was "THE KILLING FIELDS." The film opened for an exclusive run in Boston in December and opened in Philadelphia on January 18. The movie, however, opened in Washington, D.C., an unregulated jurisdiction, on the same day that it opened in Philadelphia and in both Boston and Philadelphia the picture was more broadly released on February 1.

19. Administrative expense caused by having to reoffer a film after six weeks is minimal.

mote the wider dissemination of films in the Commonwealth. The evidence showed that the Act has achieved that purpose. Some films have opened in suburban and rural areas more quickly since the Act took into effect. Indeed, some have done so on exactly the 43rd day after the initial area release.

D. *Regulation of Bidding Procedures*

The open bidding provision of the Act and the provision requiring re-bidding when the distributor rejects all bids serve a useful function by preventing certain unfair licensing practices. Before the Act, some distributors frequently gave favored exhibitors secret glances at competitors' bids, called "5 o'clock looks." Collusion between favorites often controlled the bidding for pictures. The open bidding and re-bidding requirements eliminate the 5 o'clock look, place all exhibitors on equal footing, and remove the bidding process from the dark. The distributors argue that open bidding encourages collusion among exhibitors. They admit that "documented examples of such abuse have been sparse." In fact, documented examples of such abuse are non-existent.

Plaintiffs also contend that because open bidding allows exhibitors to compare bids, they ultimately receive less favorable terms on film licenses. There is no evidence that this has occurred.[20] It seems equally likely that an exhibitor will bid higher terms after seeing his competition's bids.[21]

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20. In fact, the evidence indicated that those distributors who have adhered most closely to the open bidding provision have received higher film rental percentages since the act.

21. The plaintiffs complain that the Act allows the exhibitor who submits a bid stating only that he is "willing to negotiate" to learn about the competition's bidding practices. This position is based on a misreading of the statute. Under § 203-3 a bid "states the terms under which the exhibitor will agree to exhibit a feature motion picture." The exhibitor who is merely "willing to negotiate" has not submitted a bid and is not entitled to examine competitors' bids.

Plaintiffs next complain that distributors often prefer to accept low bids rather than submit to the time-consuming rebidding process. Rebidding, however, can take place almost instantaneously. The Act permits oral bid solicitation and oral bids. The plaintiffs have not made a credible showing that this has been a problem of any significance.

Finally, the distributors allege that the Act's regulation of bidding procedures is so onerous that it has forced some distributors to license all films in Pennsylvania by negotiation, which usually results in lower film rentals. The problem with this argument is that while some distributors have switched to negotiation, others bid just as frequently and others use bidding more frequently. Those distributors who switched to negotiation have done so as a business judgment. The Act leaves open to the choice of distributors whether to license by bidding or negotiation. There is no credible evidence that the Act has caused any distributor to stop licensing pictures by bidding.[22]

E. *Plaintiffs' and Defendants' Statistical Claims*

Both parties to this lawsuit have presented statistical evidence relating to the burdens imposed by the Pennsylvania Act.

Plaintiffs' study was far more ambitious than defendants. They collected information on every new film license issued by plaintiffs in six metropolitan areas:

22. Plaintiffs argue that those distributors who continue to bid may be able to "hold their percentage rental figures up, but may, . . . be licensing fewer runs than sought or accepting offers from subrun theatres." First, the record does not support this contention. Second, the premise behind plaintiffs' statistical study is that distributors try to maximize their film rental percentages. The argument they make here undercuts this premise by acknowledging that percentage rentals are not necessarily the bottom line for distributors.

Philadelphia, Pittsburgh, Reading/Lancaster, Scranton/ Wilkes-Barre, Harrisburg and Erie. Plaintiffs selected January 1, 1977 as the starting date and June 30, 1983 as the termination date of the study. In all, the study included approximately 14,000 licenses. Of the six and one-half year period covered by the study, the Pennsylvania statute was only in effect for two and one half years. The period between the granting of summary judgment in *AFD* I and the Court of Appeals mandate reversing and remanding that decision were counted with the time before the Act took effect as the "unregulated" periods. More than twice as many licenses were issued in these times as in the regulated periods.

Plaintiffs' study demonstrates that the distributors' film rental percentage in unregulated periods was 55% and in regulated periods was 51%. Film rental percentage is that percentage of the exhibitor's box office gross paid to the distributor as rental. Plaintiffs allege that the decline in percentage rental demonstrates significant burden caused by the Pennsylvania statute. One problem with this conclusion is that it assumes that percentage film rental is a meaningful term. The evidence suggests that percentage rental is a statistic with only marginal significance. Like other businesses, the motion picture industry looks to its dollar receipts and its bottom line to measure results. Percentage rental may have little relation to the bottom line. Plaintiffs themselves offered a great deal of testimony about differences among movie theatres. Distributors do their best to license their films to prime theatres. A distributor may not be able to license a picture to a prime theatre on terms as favorable as it can to a less attractive or spacious facility, but the film may earn more dollars at the former. In addition, there was evidence that some distributors substantially reduce contract terms in licenses with certain exhibitors by renegotiating after the run. Reductions occur even when

films are licensed by bid, where traditionally terms are held firm, and even when the film has been successful. That these reductions occur indicates that distributors do not always act to maximize percentage rental.

Another basic fallacy is plaintiff's reasoning that because distributors' share of film rental declined during the periods of regulation, the Pennsylvania Act caused the reduction. In fact, the causal connection does not appear to exist. When one examines the fortunes of each of the plaintiffs individually, it becomes extremely difficult to blame the Act for an overall decline in percentage rental. Some distributors have fared better during regulated periods than during unregulated periods. The decline of other distributors' percentage rental is more persuasively explained by factors other than the Act, such as the presence or absence of one blockbuster, or general decline in a company's fortunes.

Plaintiffs' study also fails to provide any information about the Act's effect on certain segments of the industry. Because the study was limited to films licensed by the plaintiffs, it does not show what effect, if any, the statute has on independent distributors. Furthermore, because the study was limited to six large areas, it provides no information about the effect of the statute on small towns. Plaintiffs' economics expert, in fact, testified that the study would have produced more accurate results had it been a random survey of 55% of the entire state, rather than an examination of certain metropolitan areas comprising 55% of the state's population.

Plaintiffs' expert also conducted a regression analysis to demonstrate the effect of the statute on percentage film rental. When the number of licenses on a particular film, the length of run, and the relative success of the film were held constant, the analysis showed that the presence of regulation correlated with a 2.9% decline in percentage film rental. As with plaintiffs' statistical

study, the regression analysis was founded on the assumption that distributors attempt to maximize percentage film rental. Moreover, when one makes the assumption, which I find warranted, that the presence of regulation has not caused any distributor to switch from bidding to negotiation or to renegotiate license terms downward after the run, the regression analysis shows that any effect of regulation on percentage rental is, at most, incidental.[23]

There is no credible evidence that the Act causes a switch to either negotiation or renegotiation of licenses. Certainly on its face the Act does not mandate such procedures. In addition, there is no real evidence that the Act has indirectly had such an effect on the way distributors do business. Some of the distributors license more pictures by bid now than they did before the Act became effective. The decisions by other distributors to negotiate exclusively, to engage in competitive negotiation or to discount some licenses are business decisions unrelated to the Pennsylvania Act.

Defendants' statistical claim that some exhibitors in Pennsylvania paid higher percentage film rental to all distributors after the Act than before is also flawed. The base of data for this claim includes both first run and subsequent run films, and thus fails to isolate the Act's primary impact on first run movies. The claim is also weakened by the fact that it treats as occurrences during a "regulated period" data from the period of about a year during which at least some distributors relied on the subsequently reversed ruling in *AFD* I that the Act was unconstitutional. More persuasive is evidence that indicates distributors did not receive higher percentage film

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23. When negotiation and renegotiation are factored out, the presence of regulation results in a decline in percentage rental of .94%.

rental in unregulated states than in regulated jurisdictions and evidence showing that regulation has had no real impact on plaintiffs' market share in Pennsylvania as a percentage of nationwide film rental. Such evidence suggests that differences in percentage film rental, if significant at all as a measure, do not depend on whether the distributor is subject to the kind of trade practice regulation contained in the Pennsylvania Act.

V. *Commerce Clause*

Plaintiff claims that the Pennsylvania Feature Motion Picture Fair Business Practices Law violates the Commerce Clause of the United States Constitution. Article 1 § 8, Clause 3. Even in the absence of federal legislation, the Commerce Clause places some limits on state regulation. *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851). The plaintiff distributors contend that the law discriminates against and unconstitutionally burdens interstate commerce.

A state law whose purpose or effect is to discriminate against interstate commerce constitutes simple economic protectionism and is virtually invalid *per se*. *See Bacchus Imports Ltd. v. Dias*, ____U.S. ____ , ____ , 104 S.Ct. 3049, 3054, 82 L.Ed.2d 200 (1984); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471, 101 S.Ct. 715, 727, 66 L.Ed.2d 659 (1981). The Supreme Court's definition of what constitutes a discriminatory law is narrow. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), involved a Maryland law which, in part, forced all producers and refiners of petroleum products to divest themselves of retail service stations in the state. The brunt of the statute fell completely on out-of-state companies because there were no local producers or refiners. The Court held that the statute was not discriminatory. First, it did not discriminate against out-of-state producers and refiners

because there were no producers or refiners in Maryland to favor. Second, the Court rejected appellant's claim that the statute discriminated by protecting in-state independent dealers from out-of-state competition:

> [I]n-state independent dealers will have no competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

437 U.S. at 126, 98 S.Ct. at 2214.

The Court also held:

> If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market . . . the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland and, indeed, no demonstrable effect whatsoever on the interstate flow of goods.

427 U.S. at 126, n. 16, 98 S.Ct. at 2214, n. 16.

The Pennsylvania statute at issue in this case is facially neutral. *Exxon* indicates that even if there were no Pennsylvania distributors the law would not be considered economic protectionism because it draws no distinction between in-state and out-of-state distributors. In fact, there was testimony at trial that two independent distributors, albeit small ones, are located in this Commonwealth. Just as their out-of-state competitors, these local distributors must follow all the requirements of the Feature Motion Picture Fair Business Practices Law.

The Pennsylvania statute does not discriminate against interstate commerce.[24]

Even a law which does not discriminate may be struck down if it unduly burdens interstate commerce. The applicable test was announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pennsylvania's Act regulating the licensing of motion pictures satisfies the *Pike* test.

Again, *Exxon* provides a useful comparison. There was evidence that the three refiners who marketed their product in Maryland solely through company-operated

24. The Sixth Circuit held that Ohio's trade screening and movie regulation statute was not discriminatory under the Commerce Clause because of its facial neutrality. *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 662 (6th Cir. 1982) (hereinafter *Allied* II). Also instructive is the Fourth Circuit's decision in *American Motor Sales Corp. v. Division of Motor Vehicles of the Commonwealth of Virginia*, 592 F.2d 219 (4th Cir. 1979). That case involved a Virginia statute which restricted the ability of automobile manufacturers or distributors to grant additional franchises for a particular line of vehicle in a trade area already served by one or more dealers carrying the same line. The Fourth Circuit held that because the statute drew no distinction between manufacturers within the state and those outside, it did not discriminate against interstate commerce.

stations might withdraw from selling in Maryland completely if the statute in question were enforced. There was no evidence, however, that the statute would affect the total quantity of petroleum products shipped into Maryland. In finding that the statute imposed a permissible burden on interstate commerce, the Court stated:

> The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.

437 U.S. at 127, 98 S.Ct. at 2214.

Appellants in *Exxon* also claimed that the Maryland statute would burden interstate commerce by changing the market structure in the petroleum industry. The Court also rejected that claim.

> We cannot . . . accept appellant's underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. . . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.

437 U.S. at 127-28, 98 S.Ct. at 2214-15.

There is no credible evidence that the Pennsylvania statute at issue in this case has caused any diminution in the amount of film product flowing into the state. The evidence fails also to support plaintiff's argument that the Act has delayed the introduction of some films into Pennsylvania. The benefits from the act are substantial

and outweigh the minimal burdens created by the legislation.

The prohibition against trade screening serves the primary goal of reducing the risks of deceptive licensing practices by distributors. Such a goal protects not only theatre owners in the Commonwealth, but also the public. The anti-blind bidding provision facilitates exhibitors' ability to provide communities with the films they will more likely want to see. It encourages exhibitors to license films based on the merits of the product.

The burdens imposed by the trade screening requirement are minimal by comparison. There is no constitutional right to sell a pig in a poke. The financial costs of producing a trade screening print are small in comparison with the distributors' filming budgets. The trade screening requirement has not affected the quality of films, nor has it delayed their release. That a distributor may not have its picture ready in time to license it at a prime theatre is not a result of the Act. Another distributor, one who is able to produce a trade screening print more promptly, will win the theatre. As the Court made clear in *Exxon*, the Commerce Clause protects the interstate market, not particular firms.[25]

The prohibition of guarantees and advances serves the primary purpose of preventing large exhibitors from using their deep pockets to squeeze smaller exhibitors out of the market. This benefits both small theatre owners and the public, which gains by having a greater avail-

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25. Some mention was made during trial of the practice of licensing films by blind bidding, but with a "48 hour cancellation clause." Such clauses allows exhibitors to cancel their licenses within 48 hours after actually viewing the film. Requiring the use of these clauses would not serve the public interest as successfully as the trade screening requirement. By the time the exhibitor actually sees the picture, it is generally too close to the exhibition date to license another film.

able choice of theatres and films.[26] The interests served by these clauses are legitimate ones. In *Pike*, the Court recognized a State's legitimate interest in "maximizing the financial return to an industry within it." 397 U.S. at 143, 90 S.Ct. at 848. *See also Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Later, in *New Motor Vehicle Board v. Orrin W. Fox, Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978), the Supreme Court upheld a California statute which regulated the granting of automobile franchises. Although that decision was based on the due process clause, the Court did identify "the promotion of fair dealing and the protection of small business" as valid state interests. 439 U.S. at 102, n.7. Relying in part on this language, the Fourth Circuit held that a similar Virginia statute did not unduly burden interstate commerce. *American Motors Sales Corp. v. Division of Motor Vehicles of the Commonwealth of Virginia*, 592 F.2d 219 (4th Cir. 1979).[27]

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26. There are some secondary benefits to the prohibition of guarantees and advances as well. The public benefits because exhibitors are less likely to stretch out the run of a film to try to recoup a guarantee. The prohibition also may help keep film prices in the Commonwealth stable.

27. In *Allied II* the Sixth Circuit remanded the issue of the validity of Ohio's regulation of guarantees and advances. District Court Judge Duncan had found that the regulation primarily acted to correct a bargaining imbalance between exhibitors and distributors. *Allied Artists Pictures Corp. v. Rhodes*, 496 F.Supp. 408 (S.D. Ohio 1980) (hereinafter *Allied* I). The Court of Appeals, relying on *Baldwin v. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935), concluded that "a state's interest in righting a bargaining imbalance, standing alone, is not sufficient under the Commerce Clause to permit direct interference with pricing where it burdens interstate commerce." 679 F.2d at 665. The Court remanded for a determination of whether any other legitimate local public interest existed. I do not base my decision on a bargaining imbalance between local exhibitors and out-of-state distributors. I base it instead on the state's clearly legitimate interest in maintaining the vitality of its small theatre owners and in protecting them from being engulfed

The burden imposed by the prohibition of guarantees and advances is not excessive in relation to the local benefits derived from the prohibition. Plaintiffs' own economics expert testified that the amount of unearned guarantee income was not substantial enough to affect film rental. In addition, advances are not the only effective means of dealing with slow payers or poor credit risks.

A provision merely prohibiting the solicitation of guarantees and advances, such as that in Ohio, does not serve the public interest as successfully as Pennsylvania's provision. Barring solicitation by distributors would not prevent large exhibitors from using guarantees to obtain films which might otherwise be licensed to small theatre owners.

The 42 Day provision also passes the *Pike* test. There is a legitimate and substantial benefit in promoting the faster dissemination of new films in rural and suburban areas. Once the distributors' misinterpretations of the provision are discounted, the burdens imposed by the clause are minimal. That a distributor may elect not to open a film in Pennsylvania on a given day because of the 42 day clause is a decision of marketing strategy, not an effect of the Act. The Commerce Clause does not protect the "methods of operation in a retail market," *Exxon*, 437 U.S. at 127, 98 S.Ct. at 2215, nor does it guarantee to distributors freedom from any regulation that might marginally influence their business strategy.

The Pennsylvania Act's provisions regulating bidding procedures also pass muster under the test announced in *Pike*. The open bidding and re-bidding requirements of the Act provide a substantial benefit to

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Footnote 27 (Continued)
by powerful exhibitors, both local and national. Moreover, I read *Baldwin v. Seelig, Inc.* to reject a New York law which on its face amounted to economic protectionism.

the public interest by discouraging deception by distributors and collusion between distributors and exhibitors and by encouraging honest bidding practices. The burdens imposed by these sections of the Act are minor. There was no credible evidence that the bidding procedure regulations caused any delay in the release of films or anything more than minor administrative expense.

The plaintiff's contention that the Pennsylvania Act reduced distributors' film rental does not change the balance under the *Pike* test. Cost is a factor to be taken into account when assessing burden in a Commerce Clause analysis. *Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 445 n. 21, 98 S.Ct. 787, 796 n. 21, 54 L.Ed.2d 664 (1978). Percentage film rental, however, is a term without any real meaning. Even if it did have significance, the Act is not the cause of declining percentage film rental.

Plaintiffs argue that the Act has caused some distributors to switch form bidding to negotiation and that, as a result, percentage film rental has declined. The decisions to negotiate or to renegotiate are, however, based on business judgment and are not caused by the Pennsylvania Act. In addition, when negotiation and renegotiation are held constant, plaintiff's regression analysis demonstrated only a .91% decline in percentage film rental during periods of regulation.

The Pennsylvania Feature Motion Picture Fair Business Practices Law serves legitimate and substantial public purposes. The Act takes a small step against dishonest and unfair practices in the motion picture industry. A legislature

> need not strike at all evils at the same time or in the same way. . . . [I]t may implement its program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981) (citations omitted).

In contrast to its benefits, the burdens imposed by the Pennsylvania Act are incidental and are not "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. at 847.

VI. *The First and Fourteenth Amendments*

The Pennsylvania Feature Motion Picture Fair Business Practices Law does not violate the First and the Fourteenth Amendments to the United States Constitution. In its opinion reversing *AFD* I, the Court of Appeals stated the test by which this Court must evaluate the statute. *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808, 813 (3d Cir.1982). Although motion pictures are protected by the First Amendment, *Interstate Circuit v. Dallas*, 390 U.S. 676, 682, 88 S.Ct, 1298, 1302, 20 L.Ed.2d 225 (1968), the Court held that the Pennsylvania Act is content-neutral trade practice legislation. As such, the applicable test is that set forth in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, *rehearing denied*, 393 U.S. 900, 89 S.Ct. 63, 21 L.Ed.2d 188 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government, if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The Court of Appeals remanded this case for a factual determination of the Act's actual threat to First Amendment values, the nature and weight of the state's interests in enacting the law and a balancing of the

state's concerns against the impact on the First Amendment.

In fact, the Pennsylvania Act has had little or no impact on First Amendment values. There was no credible evidence that the Act has had or will have any effect on the quality or number of films being produced or being exhibited in the Commonwealth of Pennsylvania. There was also no evidence that the Act has caused a material delay in the exhibition of films in the Commonwealth. No evidence was offered which suggested that more films miss their release dates now than before the Act. The trade screening requirement, when combined with production delays, creates a minimal risk of delayed release. Distributors, however, accelerate post-production and have missed release dates in only a handful of cases. Even in these instances, it is not proven that the Act caused the delay. Plaintiffs claim that some distributors have chosen not to release certain films at an early date in Pennsylvania because of the 42-day clause. Although it may marginally influence a distributor's marketing decision, the clause does not compel the distributor to make such a decision.

The concerns which led the Commonwealth to enact the Act are substantial. The Act promotes fair dealing between distributors and exhibitors, helps preserve the viability of small exhibitors and promotes wider dissemination of films at diverse locations and at reasonable prices. The statute, in fact, advances some of the interests underlying the First Amendment. The trade screening requirement encourages innovation by making it more likely that films will be licensed on merit rather than on the name of their producer, director or star. The abolition of guarantees and advances promotes competition among exhibitors, and promotes the exhibition of a variety of films at many locations. The 42 day provision makes it easier for people living outside cities to see films more quickly.

On balance, the Feature Motion Picture Fair Business Practices Law satisfies the *O'Brien* standard. It was within the constitutional power of the state to enact the law.[28] The legislation furthers a substantial state interest which is content-neutral and, therefore, unrelated to the suppression of free expression. The impact of this law on First Amendment freedoms in *de minimis* and, in any event, is outweighed by the interests of the state in passing the statute.[29]

VII. *Copyright Preemption*

Plaintiffs' third claim is that the Federal Copyright Act, 17 U.S.C. § 101 *et seq.*, and the Supremacy Clause

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28. I will discuss the validity of the statute under the Pennsylvania Constitution in a later portion of this opinion.

29. *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), was decided after the Third Circuit's opinion in *AFD* II and the Sixth Circuit's opinion in *Allied* II. In that case, a newspaper challenged a Minnesota statute which imposed a use tax on ink and paper. The tax exempted the first $100,000 spent by a publication on ink and paper in any calendar year. The Court stated that "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. . . . Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." 460 U.S. at 585, 103 S.Ct. at 1372. The decision in *Minneapolis Star* is distinguishable. Pennsylvania has not imposed a tax on distributors. It is not proven that the legislation in the present case has had *any* impact on profits. Moreover, the differential treatment of the movie industry in Pennsylvania's laws is justified by the special problems of that industry. The Commonwealth's attempt to remedy these specific evils is not related to the suppression of free expression and is warranted by the state's interest in reforming the licensing process. Finally, the decision in *Minneapolis Star* rested, in part, on the fact that the Minnesota statute was not content-neutral in that its burden rested solely on large periodicals.

of Article VI of the United States Constitution preempt the Pennsylvania statute. The district judge's original opinion in *AFD* I ruled that on its face the Pennsylvania Act was preempted by the copyright laws. 520 F.Supp. at 995. The Court of Appeals reversed and remanded for a determination of whether "the prohibitions contained in the Pennsylvania Act *in fact* stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . . The question of whether and to what extent the Pennsylvania Act interferes with attaining the 'purposes and objectives of Congress' is one which must be resolved before the trial court can decide, as a matter of law, whether the interference (if any) is such as to require invalidation of all or part of the Pennsylvania Act on preemption grounds." 683 F.2d at 816.

The Supreme Court has held recently that preemption of a state law will occur:

> [f]irst, when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law . . .; second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation . . .; and, finally, when compliance with both state and federal law is impossible . . . or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Capital Cities Cable, Inc. v. Crisp, ____U.S.____, ____ - ____, 104 S.Ct. 2694, 2700, 81 L.Ed.2d 580, 588-89 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)).

Plaintiffs claim that the Pennsylvania Act fails to pass muster under the first and third tests.

For its argument that the Act violates the first test, plaintiffs rely on 17 U.S.C. § 301, which states:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright . . . whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

* * * * *

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

17 U.S.C. § 106 provides that the owner of a copyright has the exclusive right to do any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies of phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial,

> graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

The narrow question is whether the state statute grants any rights equivalent to the exclusive rights given to copyright owners. As the Court of Appeals stated in *AFD* II, "the Act does not take away from plaintiffs and give to another the right to reproduce the film, to prepare derivative works based on the film, to distribute the film, or to license its performance." 683 F.2d at 816. The statute does not create any rights equivalent to those enumerated in § 106 on its face or in practice.

The purpose of § 301 was not to invalidate state trade practice legislation, but to eliminate the former system in which federal copyright law controlled published works and state law unpublished works.

> Instead of a dual system of "common law copyright" for unpublished works and statutory copyright for published works . . . the bill adopts a single system of Federal statutory copyright from creation. . . . Common law copyright protection for works coming within the scope of the statute would be abrogated. . . .

Notes of the Committee on the Judiciary, House Report No. 94-1476, 94th Cong., 2d Sess. (1976) (reprinted at pp. 271-72 of 17 U.S.C.A. (1977)).

As Professor Nimmer explains, § 106 identifies those rights which are within "the general scope of copyright." The copyright owner's right is the exclusive right "to prohibit reproduction, . . . performance, distribution or display" of the copyrighted work. 1 *Nimmer On Copyright*, § 1.01[B] at 1-11, 1-12.

> Thus, in essence a right which is "equivalent to copyright" is one which is infringed by the mere act

> of reproduction, performance, distribution or display. . . . If under state law the act of reproduction, performance, distribution or display, no matter whether the law includes all such acts or only some, will *in itself* infringe the state created right, then such right is pre-empted. But if other elements are required, in addition to or instead of, the acts of reproduction, performance, distribution or display, in order to constitute a state created cause of action, then the right does not lie "within the general scope of copyright," and there is no preemption.

id.[30]

Acts other than the acts of reproduction, performance, distribution or display are necessary elements of violations under the Pennsylvania statute.[31] The Act does not create any rights equivalent to those guaranteed to the copyright owner and is not pre-empted by 17 U.S.C. § 301.

I turn now to plaintiffs' contention that the Act is pre-empted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S.

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30. § 301(b) of the Copyright Act, as originally drafted stated:

> Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any state with respect to—
>
> (3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

§ 301(b)(3), H.R. 4347, 89th Cong., 2d Sess. (1966). The elimination of the illustrative clause in § 301(b)(3) was not intended as a substantive change in the meaning of the provision. 1 *Nimmer* on *Copyright*, § 1.01[B] at 1-14.3.

31. In the Ohio litigation, Judge Duncan used this framework to find that the Ohio statute was not pre-empted by the federal copyright act. *Allied* I, 496 F.Supp. at 407-08.

52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). The Court of Appeals in *AFD* II remanded because *on its face* the Act did not interfere with the purposes and objectives of the copyright laws. After full trial on the merits, this Court concludes that the Act does not stand as an obstacle to the federal copyright system in practice. As the Court stated in *Mariniello v. Shell Oil Company*, 511 F.2d 853, 857-58 (3d Cir.1975):

> In recent times, the Supreme Court has employed the Supremacy clause sparingly to strike down state law. . . . Where conflict is alleged between federal and state law, the specific purpose of the federal act must be ascertained in order to assess any potential erosion of the federal plan by operation of the state law.

Article I, § 8 of the United States Constitution, which confers on Congress the power to legislate in the field of copyright, explicitly declares that the purpose of copyright is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries." The Copyright Act is "based on the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors," *AFD* II, 683 F.2d at 815 (quoting *Allied I*, 496 F.Supp. at 446); however, "[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *AFD* II, 683 F.2d at 815 (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. at 158, 68 S.Ct. at 929).

In remanding this case, the Court of Appeals explicitly adopted the framework of analysis set forth by Judge Duncan in *Allied* I:

> The Supreme Court has rejected the notion that because "a copyright is property derived from a grant

by the United States," it is not subject to state regulation of the manner in which its product is marketed. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 128, 52 S.Ct. 546, 547, 76 L.Ed. 1010 (1932). Further, the Supreme Court has rejected claims that the exclusive right granted by Congress to distribute copyrighted material included the exclusive right to distribute it in the manner deemed most desirable by the copyright holder. *Watson v. Buck*, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941).

In *Fox Film, supra*, the Supreme Court upheld a state's direct taking by imposition of a tax of royalties derived from federal copyrights. Scarcely a more blatant, effective method of reducing the author's award can be imagined. Yet the Court stated:

> The statute confers upon the author after publication the exclusive right for a limited period to multiply and vend copies and to engage in the other activities described by the statute in relation to the subject matter, U.S.C., Tit. 17. In creating this right, the Congress did not reserve to the United States any interest in the production itself, or in the copyright, or in the profits that may be derived from its use. Nor did the Congress provide that the right, or the gains from its exercise, would be free of tax. The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.
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> * * * * *

> . . . The nature and purpose of copyrights place them in a distinct category and we are unable to find any basis for the supposition that a nondiscriminatory tax on royalties hampers in the slightest degree the execution of the policy of the copyright statute.

Fox Film, supra, 286 U.S. at 127, 131, 52 S.Ct. at 548 (citations omitted).

The authority of the states to regulate market practices dealing with copyrighted subject matter is well-established. Thus, for example, the Supreme Court has made it clear that the existence of a copyright does not permit its owner to contract concerning it in ways that suppress competition in violation of federal antitrust laws. 15 U.S.C. § 1, *et seq. Interstate Circuit v. United States,* 306 U.S. 208, 230, 59 S.Ct. 467, 476, 83 L.Ed. 610 (1939). Similarly, ownership of a copyright does not entitle a company to abuse the market power it obtains thereby by engaging in a *per se* illegal tying arrangement, *see e.g., United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 156-57, 68 S.Ct. 915, 928-29, 92 L.Ed. 1260 (1948), price fixing, *see, e.g., Watson v. Buck,* 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941), or other fraudulent or deceptive practices, *cf. Mariniello v. Shell Oil Co.,* 511 F.2d 853 (3d Cir. 1975); *Hearing Aid Ass'n. of Kentucky, Inc. v. Bullock,* 413 F.Supp. 1032 (E.D.Ky. 1976).

The State of Ohio is no more interfering with the legitimate rights of owners of copyrighted motion pictures by regulating the ways in which plaintiffs and other producer-distributors license their product in order to achieve fair and open bargaining than were the states in passing the legislation upheld in those cases.

AFD II, 683 F.2d at 815-16, (quoting *Allied* I, 496 F.Supp. at 446-47).

The Courts of Appeals for the Third and Sixth Circuits, in considering this issue, have stated:

> we do not find authority for the argument that state trade regulation which affects distribution procedures and, indirectly, monetary returns from copyrighted property is invalidated implicitly or explicitly by the terms of the Copyright Act . . . or the copyright clause [of the United States Constitution].

AFD II, 683 F.2d at 816 (quoting *Allied* II, 679 F.2d at 661-63).

The question for this court is "whether the Pennsylvania Act in fact precludes the 'accomplishment and execution of the full purposes and objectives' of the Copyright Act." *AFD* II, 683 F.2d at 817.

Plaintiffs have not fulfilled their burden of demonstrating that the Pennsylvania Feature Motion Picture Fair Business Practices Law has interfered with the Federal Copyright Act. The evidence produced at trial showed that the Pennsylvania Act has had no effect on the incentive to make and distribute motion pictures. There was no evidence that fewer motion pictures are being made today or that the quality of pictures has declined. The Copyright Act does not guarantee an author maximum profit and, in any event, it is not proven that the Pennsylvania Act has reduced the distributors' reward.

The Pennsylvania statute does not dilute the distributors' ownership rights in their films. They maintain exclusive control over the decision whether to license as well as when to license and to whom to license. The Pennsylvania Act may change the way distributors do business. It does not, however, take from them the essential rights of ownership.

Plaintiffs argue that the statute interferes with the copyright owner's exclusive right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending." 17 U.S.C. § 106(3). This argument is misplaced. The Pennsylvania Act sets no limit on the financial terms at which films may be licensed. The Act in no respect prevents a distributor from selling a film to a theatre owner outright, nor does it interfere with the distributor's ability to license a film to an exhibitor. The Act does not prevent the distributor from assuring itself of a fixed amount of remuneration for a license. Distributors may still license films for fixed sums. The prohibition of guarantees means that the distributor cannot have it both ways where there are adverse consequences; it cannot license a film on a percentage rental basis and at the same time receive a guaranteed minimum payment.

The invalidation of advances does not restrict the distributors' right to license its films. The Copyright Act does not assure security for the copyright owner. An exclusive ownership right is not equivalent to a right to license without risk.

Plaintiffs have also contended that inherent in the exclusive right to distribute is the right to offer a film at the time which the copyright owner considers most advantageous. Plaintiffs' argument is that the Pennsylvania Act imposes a direct control on the timing of licensing by preconditioning it on trade screening. The evidence presented at trial, however, showed that the Act has not impaired distributors' ability to release their films on the dates they desire. Although it is true that the statute prevents distributors from contracting until a trade screening print is available, this has little effect on the essential rights of the copyright owner:

> There is nothing in the federal Copyright Act prohibiting the state from exercising its police powers to

rectify a market situation it perceives as inequitable. The comment by the Supreme Court regarding the practice of block booking in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 [68 S.Ct. 915, 929, 92 L.Ed. 1260] . . . is apropos:

> It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. . . . The [prohibited] practice tends to equalize rather than differentiate the reward for the individual copyrights.

Allied I, 496 F.Supp. at 447.

Blind bidding forces exhibitors to license on the basis of inadequate and misleading information. It rewards hype, not artistic merit. The right to sell in this manner is not related to the quality of the copyright.

Plaintiffs have also argued that the trade screening provision deprives copyright holders of their ownership rights by requiring them to display their product when they would not ordinarily wish to do so. As Judge Duncan noted in *Allied* I, the trade screening requirement does not impede the copyright owner's right to *prohibit* display or distribution. The distributor must only trade screen if it decides to license in Pennsylvania. *Allied* I, 496 F.Supp. at 447. The trade screening requirement does not interfere with the purposes of the Copyright Act.

The plaintiffs' next contention is that the Pennsylvania Act's 42 day clause interferes with the copyright owner's right to license exclusively for the life of the copyright. After hearing the evidence in this case and after discounting the distributors' misinterpretations of the statute, the Court concludes that the 42 day

provision's interference with the exclusive rights of the copyright owner is minimal. The statute does not prevent distributors from contracting for runs of longer than six weeks. It merely says that if such a contract is made, it must contain some provision for expanding the run within the geographical area after the forty-second day. The statute also does not prevent a distributor from entering into a series of exclusive licenses with one exhibitor as long as each license does not exceed 42 days. The facts produced at trial failed to show that the 42 day clause has in any respect dampened incentive in the motion picture industry, nor has it interfered with the purpose or execution of the Copyright Act.

In fact, the 42 day clause and the Pennsylvania statute as a whole promote the purposes underlying the Copyright Act. The Act improves the public's access to creative products. The 42 day clause benefits the public by quickening the wide dissemination of creative works. Similarly, the prohibition of guarantees and advances helps maintain the viability of small exhibitors, increasing the public's choice of theatres and films. Finally, the trade screening requirement allows exhibitors to differentiate pictures on the basis of factors relating to merit and, therefore, may afford independent, lesser known distributors a better chance to display their wares.

VIII. *Pennsylvania Constitution*

Plaintiffs' final claim is that the Pennsylvania Feature Motion Picture Fair Business Practices Law violates Article III, Section 32 of the Pennsylvania Constitution, which is the Commonwealth's version of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It provides:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:
>
> 1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:
>
> * * * * *
>
> 7. Regulating labor, trade, mining or manufacturing . . .

The Pennsylvania Act does not violate Section 32. First, the act does not constitute a "special law." In *Commonwealth v. Webb*, 1 Pa.Cmwlth. 151, 162, 274 A.2d 261, 267 (1971), the Commonwealth Court held:

> [i]n the exercise of the police power, and in the interest and for the protection of the public, the state may, without denial of the equal protection of the laws, reasonably regulate a business, a useful trade, occupation, or profession which may prove injurious to the public, just so the legislation is not discriminatory in the sense of applying unequally to persons pursuing or engaged in the same calling, profession, or business under the same or like conditions and circumstances.

The Pennsylvania legislation at issue in this case benefits the public interest and is a valid and reasonable exercise of the police power.[32] While the Act distinguishes the motion picture industry from other trades, it applies equally to persons and firms within that business. The Act, therefore, constitutes a general law not

32. Plaintiffs rely heavily on *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 58 A.2d 464 (1948). For the purposes of this case, however, *Hertz* stands for the proposition that a law must bear a reasonable and substantial relation to an end which serves the public interest. 359 Pa. at 47, 58 A.2d at 476. The Pennsylvania Act satisfies this standard.

subject to the provisions of Article III, Section 32 of the Pennsylvania Constitution. *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978) is not to the contrary. In *Kroger*, the Pennsylvania Supreme Court held unconstitutional Pennsylvania's Sunday Trading Laws, known also as blue laws. The Pennsylvania blue laws represented exactly that type of special legislation § 32 was meant to combat:

> [W]hen a law which prohibits business activity is riddled with exception after exception, a time comes when the general scheme is so diluted that it violates the equal protection of the laws.

481 Pa. at 116, 392 A.2d at 273.

Even if the Pennsylvania statute is considered a "special law," it passes muster under *Kroger*. *Kroger* held that § 32 mandates careful scrutiny of any special law regulating trade. Although the Court explicitly deferred the question of what is the appropriate test, I have little doubt that the highest court of this Commonwealth would hold that the legislative classification must have a (1) fair and substantial relationship to the object of the legislation and (2) must substantially further the statutory objective. The first part of the test is derived from previous pronouncements of the Court. *See Moyer v. Phillips*, 462 Pa. 395, 400, 341 A.2d 441, 443 (1973); *In re Estate of Cavill*, 459 Pa. 411, 329 A.2d 503 (1974). A fair and substantial relationship is one which rests "upon some ground of difference which has a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Kroger*, 481 Pa. at 119, 392 A.2d at 275.

The *Kroger* case itself mandates that the legislation must *substantially* further the statutory objective to pass muster under § 32. 481 Pa. at 121-22, 392 A.2d at 276.[33]

The Pennsylvania Feature Motion Picture Fair Business Practices Law presents a classification which bears a fair and substantial relationship to the legislative objective. I have described the problems specific to the movie industry which the Act addresses. The Act also substantially furthers the statutory objective. While it does not right every wrong, it takes a step toward remedying unfair and deceptive practices which often occur in the licensing of motion pictures.

IX. *Conclusion*

The effect of the Pennsylvania statute on the businesses of both exhibitors and distributors has been miniscule compared to the competing claims that it is a salvation and damnation. The Act has not materially affected the bottom lines of either the distribution or exhibition businesses. The ingenuity and adaptability of both retailers and wholesalers of movies has far outdistanced the modest proscriptions of the law. Trade screening of prints is a minor problem in the scheme of producing movies. The trade screening requirement seems to concern the middle management cost accountants of the wholesale movie business, but does not materially affect production, distribution or profitability of the business. Trade screening does, however, benefit those exhibitors who use it to select films on the merits of likely box office issues. The requirements of open bidding, prohibiting guarantees and advances and limiting

33. Even if the Pennsylvania Supreme Court were to apply to Article III, Section 32 of the Pennsylvania Constitution the most stringent test under federal equal protection analysis, *i.e.*, that the law must be necessary to the accomplishment of a compelling state interest, *Palmore v. Sidoti*, ___ U.S. ___, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984), the Pennsylvania Act would satisfy that standard.

exclusive first runs to 42 days work benefits by promoting wider dissemination of films and fairer trade practices with little negative impact. Matters of importance in the film business turn on luck, market power, money, sharp dealing and other factors unrelated to the relatively minor and modest trade practice regulation of the Pennsylvania Act.

DISTRICT COURT ORDER ENTERING JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASSOCIATED FILM DISTRIBUTION CORPORATION, et al.	:	CIVIL ACTION
vs.	:	
THE HONORABLE DICK THORNBURGH, et al.	:	No. 80-1179

ORDER

AND NOW, this 5th day of August, 1985, judgment is entered in favor of defendants and against plaintiffs, declaring that the Pennsylvania Feature Motion Picture Fair Business Practices Law is constitutional.

I direct entry of this final judgment under Rule 54(b), there being no just reason for delay.

BY THE COURT:

MARVIN KATZ

MARVIN KATZ, J.

COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1545

ASSOCIATED FILM DISTRIBUTION CORPORATION et al.,

Appellants

v.

THE HON. DICK THORNBURGH et al.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges*, and MENCER, *District Judge**

The petition for rehearing filed by Appellants, Associated Film Distribution Corporation et al., in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the

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*Hon. Glenn E. Mencer, United States District Court for the Western District of Pennsylvania, sitting by designation.

petition for rehearing is denied. Judges Gibbons, Sloviter, Becker, Stapleton, and Mansmann would grant the petition for rehearing.

By the Court,

DELORES K. SLOVITER
Circuit Judge

Dated: October 14, 1986

COURT OF APPEALS JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 85-1545

ASSOCIATED FILM DISTRIBUTION CORPORATION, AVCO EMBASSY PICTURES CORP., BUENA VISTA DISTRIBUTION CO., INC., COLUMBIA PICTURE INDUSTRIES, INC., FILMWAYS PICTURES, INC., METRO GOLDWYN-MAYER, INC., PARAMOUNT PICTURES CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION, UNIVERSAL PICTURES DIVISION OF UNIVERSAL CITY STUDIOS, INC., UNIVERSAL FILM EXCHANGES, WARNER BROS., INC., and WARNER BROS. DISTRIBUTING CORPORATION,

Appellants

v.

THE HONORABLE DICK THORNBURGH, Governor of the Commonwealth of Pennsylvania, individually and in his official capacity, HARVEY BARTLE, III, Attorney General for the Commonwealth of Pennsylvania, individually and in his official capacity, BUDCO THEATRES, INC., BUDCO QUALITY THEATRES, INC., its subsidiary corporation, and FOX THEATRES MANAGEMENT CORPORATION

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 80-1179)

Present: SLOVITER and STAPLETON, *Circuit Judges* and MENCER, *District Judge**

* Hon. Glenn E. Mencer, United States District Court for the Western District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel May 1, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 2, 1985, be, and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:

SALLY MRVOS
Clerk

September 12, 1986

Certified as a true copy and reissued in lieu of a formal mandate on October 22, 1986.

Test: M. ELIZABETH FERGUSON
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Costs taxed in favor of appellee (Budco Theatres, Inc.) as follows:

Brief.....$307.50

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

Copyright Clause, Art. I, Sec. 8, cl. 8.

The Congress shall have Power . . .

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Supremacy Clause, Art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Copyright Act

United States Code, Title 17

Section 101. Definitions.

As used in this title, the following terms and their variant forms mean the following:

* * *

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

* * *

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

* * *

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

* * *

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

* * *

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

* * *

Section 102. Subject matter of copyright: In general.

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works; and

(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Section 106. Exclusive rights in copyrighted works.

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Section 302. Duration of copyright: Works created on or after January 1, 1978.

(a) In general. Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.

* * *

Feature Motion Picture Fair Business Practices Law

Act No. 1980-14, 1980 Pa. Laws 40,
73 Pa. Stat. Ann. §§ 203-1 to 203-11 (Purdon)

AN ACT Regulating the practices of feature motion picture exhibitors and distributors or licensors and providing remedies for violations and penalties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1 [73 Pa. Stat. Ann. § 203-1]. Short title.

This act shall be known and may be cited as the "Feature Motion Picture Fair Business Practices Law."

Section 2 [73 Pa. Stat. Ann. § 203-2]. Legislative findings and purposes.

The General Assembly of the Commonwealth of Pennsylvania finds and declares that the licensing and distribution of feature motion pictures to theatres in this Commonwealth, including the rights and obligations of distributors and exhibitors, vitally affects the general economy as well as the access of the public to works of artistic expression and opinion. In order to promote the public interest and public welfare of this Commonwealth to:

(1) insure unabridged access for the public to artistic expression and opinion in feature motion pictures at reasonable prices and at many different locations;

(2) avoid undue control of the exhibitors by the distributors;

(3) foster vigorous and healthy competition in offering feature motion pictures for the benefit of the public by prohibiting practices through which fair

and honest competition is restrained, destroyed or inhibited;

(4) promote the wide geographical dissemination at reasonable prices to the public of ideas, opinions and artistic expression in feature motion pictures;

(5) prevent delay in the exhibition of feature motion pictures to the public in theatres playing subsequent to the first run showing;

(6) prevent theatres from unnecessarily going out of business, thereby resulting in reducing the number of small independent businesses and unemployment with loss of tax revenues and other undesirable consequences;

(7) prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of distribution and exhibition of feature motion pictures within the Commonwealth;

(8) promote fair and effective competition in that business;

(9) benefit the movie going public by limiting the long and extensive first runs so that additional theatres, in a given area, may also exhibit the same feature motion picture and at possibly a lower admission price; and

(10) prohibit blind bidding by insuring that exhibitors have the opportunity to view a motion picture and know its contents before committing themselves to exhibit it in their communities;

it is necessary to legislate regulations and standards pursuant to the exercise of the police power of this Commonwealth governing the relationship between feature motion picture distributors or licensors and exhibitors serving the public by establishing fair business practice

procedures for the licensing and distribution of feature motion pictures within the Commonwealth and to provide remedies for the violation of this act, including damages and attorneys' fees.

Section 3 [73 Pa. Stat. Ann. § 203-3]. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Bid." A written or oral proposal by an exhibitor to a distributor, which proposal is in response to an invitation to bid or negotiate and states the terms under which the exhibitor will agree to exhibit a feature motion picture.

"Blind bidding." Bidding, negotiating, offering terms, accepting a bid or agreeing to terms for the purpose of entering into a license agreement prior to a trade screening of the feature motion picture that is the subject to the agreement.

"Distributor." Any person engaged in the business of renting, selling or licensing feature motion pictures to exhibitors.

"Exhibit or exhibition." Showing feature motion pictures to the public for a charge.

"Exhibitor." Any person engaged in the business of operating one or more theatres in this Commonwealth.

"Invitation to bid." A written or oral solicitation or invitation by a distributor to one or more exhibitors to bid or negotiate for the right to exhibit a feature motion picture.

"License agreement." Any contract, agreement, understanding or condition between a distributor and an exhibitor for the exhibition of a feature motion picture by the exhibitor.

"Person." One or more individuals, partnerships, associations, societies, trusts or corporations.

"Run." The continuous exhibition of a feature motion picture in a defined geographical area for a specified period of time. A "first run" is the first exhibition of a feature motion picture in the designated area; a "second run" is the second exhibition and "subsequent runs" are subsequent exhibitions after the second run. "Exclusive run" is any run limited to a single theatre in a defined geographical area and a "nonexclusive" or "multiple run" is any run in more than one theatre in a defined geographical area.

"Theatre." Any establishment in which feature motion pictures are exhibited regularly to the public for a charge.

"Trade screening." The showing of a feature motion picture by a distributor in recognized exchange cities within the Commonwealth which is open to any exhibitor.

Section 4 [73 Pa. Stat. Ann. § 203-4]. Blind bidding.

Blind bidding is hereby prohibited within the Commonwealth. No negotiations between exhibitors and distributors for the licensing or exhibition of a feature motion picture shall take place and no license agreement or any of its terms shall be agreed to for the exhibition of any feature motion picture within the Commonwealth before the feature motion picture has been trade screened within the Commonwealth.

Section 5 [73 Pa. Stat. Ann. § 203-5]. Guarantees.

(a) Minimum payment to distributor.—It shall be unlawful for any license agreement which provides for a fee or other payment to the distributor based in whole or in part on the attendance or the box office receipts at a

theatre within the Commonwealth to contain or be conditioned upon a guarantee of a minimum payment to the distributor.

(b) Prohibited guarantees void.—Any provision, agreement or understanding which provides for such a guarantee shall be void and purported waiver of the prohibition in subsection (a) shall be void and unenforceable.

Section 6 [73 Pa. Stat. Ann. § 203-6]. Advances.

(a) Advances prohibited.—It shall be unlawful for any license agreement for the exhibition of a feature motion picture at a theatre within the Commonwealth to contain or be conditioned upon a provision, agreement or understanding that the exhibitor shall advance any funds prior to the exhibition of the picture as security for the performance of the license agreement or to be applied to payments under such an agreement.

(b) Prohibited advances void.—Any provision, agreement or understanding which provides for such an advance shall be void and any purported waiver of the prohibition in subsection (a) shall be void and unenforceable.

Section 7 [73 Pa. Stat. Ann. § 203-7]. Length of run.

No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.

Section 8 [73 Pa. Stat. Ann. § 203-8]. Bidding procedures.

(a) Invitation to bid contents.—If bids are solicited from exhibitors for the licensing of a feature motion picture within the Commonwealth, then the invitation to bid shall specify the following:

(1) Whether the run for which the bid is being solicited is a first, second or subsequent run; whether the run is an exclusive or nonexclusive run; and the geographical area for the run.

(2) The names of all exhibitors who are being solicited.

(3) The date and hour the invitation to bid expires.

(4) The time, date, name and address of the location where the bids will be opened, which location shall be in the exchange centers of this Commonwealth.

(b) Trade screening.—If the motion picture that is the subject of a bid has not already been trade screened within the exchange centers in this Commonwealth, the distributor soliciting the bid shall include in the invitation to bid, the date, time and location of the trade screening for such picture.

(c) Bid submission and opening.—All bids shall be submitted in writing and shall be opened at the same time and in the presence of those exhibitors, or their agents, who submitted bids and are present at such time.

(d) Examination of bids.—Any exhibitor, or the agent of an exhibitor, who submits a bid for a particular run of a feature motion picture may, at reasonable times within 60 days after a bid is opened, examine any bid that is made for the same run of the motion picture by another exhibitor. The exhibitor may examine the bids even if the distributor rejects all bids that are submitted.

Within seven business days after a bid for a particular run of a feature motion picture is accepted, the distributor shall notify in writing each exhibitor who submitted a bid for that run, the terms of the accepted bid and the identity of the successful bidder.

(e) Rejection of all bids.—If a distributor issues invitations to bid for a feature motion picture and rejects all bids received, he shall not enter into a license agreement for the exhibition of the picutre except by means of the bidding process specified in this section. If the distributor rejects all bids submitted pursuant to the invitation to bid, he shall notify all exhibitors who submitted bids that he rejected all bids and shall issue a new invitation to bid.

Section 9 [73 Pa. Stat. Ann. § 203-9]. Application of act to prior agreements.

This act shall not apply to any license agreement entered into prior to the effective date of this act, except that a renewal of such license agreement shall not be excluded from the application of this act.

Section 10 [73 Pa. Stat. Ann. § 203-10]. Actions against distributors and exhibitors.

Any exhibitor may bring an action against a distributor or exhibitor or both in the respective court of common pleas wherein the exhibitor's business is located to recover damages sustained by reason of a willful and intentional violation of this act and, where appropriate, shall be entitled to injunctive relief. Such exhibitor, if successful, shall also be awarded the costs of the action including, but not limited to, reasonable attorneys' fees.

Section 11 [73 Pa. Stat. Ann. § 203-11]. Liability of exhibitor for furnishing information.

No liability on the part of and no cause of action of any nature shall arise against any exhibitor, its officers,

agents or employees furnishing information as to violations of this act, or for statements made or evidence submitted at any hearing or trial conducted in connection therewith.

Section 12. Effective date.

This act shall take effect in 60 days.

APPROVED—The 29th day of February, A. D. 1980.

DICK THORNBURGH